TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
PETITIONERS,

vs.

THE STATE OF NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

PETITION FOR CERTIORARI FILED MAY 13, 1944.

CERTIORARI GRANTED JUNE 12, 1944.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN SUPERIOR COURT OF CALDWELL COUNTY

STATE

v.

O. B. WILLIAMS and LILLY SHAVER HENDRIX

Before Ervin, Special J., November 29, 1943, Caldwell Superior Court—Defendants Appealed

ORGANIZATION OF THE COURT

Be it Remembered that a Superior Court Term is begun and held for the County of Caldwell at the Courthouse in Lenoir, North Carolina, on November 29, 1943, it being the first Monday before the first Monday in December 1943, when and where the Honorable S. J. Ervin, Jr., assigned to and holding the courts of Caldwell County being present and presiding; and the Honorable L. S. Spurling, Solicitor for the Sixteenth Judicial District, being present and prosecuting in behalf of the State.

J. F. Parlier, Sheriff of Caldwell County, North Carolina, returned as summoned by him, the following good and lawful men to serve as grand jurors: A. S. Nelson (Foreman), and others, (naming them).

Before the jury was selected or impanelled or a plea of not guilty was entered, the defendants and each of them, through their counsel, entered a special appearance and made motion to dismiss as follows:

[fol. 2] IN SUPERIOR COURT OF CALDWELL COUNTY

SPECIAL APPEARANCE AND MOTION TO DISMISS

Now come the defendants, through their counsel, W. H. Strickland, and enter this their special appearance and motion to dismiss and would respectfully show unto the Court the following:

1. That the defendants, and each of them, have heretofore been placed in jeopardy of their liberty and that the identical cause of action has been prosecuted through the Supreme Court of the United States wherein an opinion was rendered as reported in Volume 87, Lawyers' Edition,

at page 189, wherein the judgment of the Supreme Court of North Carolina was reversed and the defendants set at liberty, said Supreme Court of the United States, specifically overruling Haddock v. Haddock, 201 U. S. 562, the former decision of said Court upon which the North Carolina Supreme Court affirmed a conviction of said defendants.

2. That the action of the Supreme Court of North Carolina remanding said cause to the Superior Court of Caldwell County for a new trial is not consistent with the opinion of the Supreme Court of the United States above referred to for the reason that the majority opinion closed as follows: "Haddock v. Haddock is overruled. The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion.

It is so ordered."

3. That the Supreme Court of North Carolina failed and refused to reverse its judgment as directed by the Supreme Court of the United States but on the contrary "vacated" its judgment, it being the contention of the defendants that the Supreme Court of North Carolina having "vacated" its judgment that it was without authority thereafter to direct a new trial.

4. That the Supreme Court of North Carolina ordered a new trial of the defendants without assigning any errors [fol. 3] committed by the Superior Court of Caldwell County, and that, therefore, the opinion of the United States Supreme Court hereinbefore referred to constitutes the law of the case and is binding upon the State of North Carolina as well as the defendants.

Wherefore, the defendants, through their counsel, pray the Court on this their special appearance that said cause of action be dismissed on the grounds of former jeopardy and the other grounds herein specifically set out.

(Signed) W. H. Strickland, Atty. for Defendants.

Motion to dismiss and each portion thereof is denied. The defendants, and each of them, excepted in apt time to the ruling of the Court.

Exception No. 1.

IN SUPERIOR COURT OF CALDWELL COUNTY

BILL OF INDICTMENT

The jurors for the State, upon their oath, present: That O. B. Williams and Lillie Shaver Hendrix, late of the County of Caldwell, on the 4th day of October, in the year of our Lord one thousand nine hundred and forty, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did get married to each other in the City of Las Vegas in the State of Nevada, and thereafter returned to the State of North Carolina and did live together and cohabit together in the said State of North Carolina and in Caldwell County, the said O. B. Williams having a living wife, one Mrs. O. B. Wyke Williams, living in Caldwell County, North Carolina, at the time of his said marriage to Lillie Shaver Hendrix, and the said Lilly Shaver Hendrix having a living husband, one Tom Hendrix, living in Caldwell County, North Carolina, at the time of her marriage to the said O. B. Williams, against the form of the statute in such case made and provided and against the peace and dignity of the State.

L. S. Spurling, Solicitor.

Returned a True Bill. A. S. Nelson, Foreman Grand Jury.

[fol. 4] IN SUPERIOR COURT OF CALDWELL COUNTY

PLEA

And the said O. B. Williams and Lillie Shaver Hendrix are brought to the bar of the Court here in their proper persons, by the said Sheriff of Caldwell County, in whose custody they are. And forthwith, it being demanded of them how they will acquit themselves of the premises in the said indictment, above specified and charged upon them, they saith that they are not guilty thereof, and thereof for good and for evil they put themselves upon the Country. And L. S. Spurling, Solicitor who prosecutes for the State on this behalf, does the like.

Therefore, let a jury come of good and lawful men, by whom the truth of the matter may be better known. The prisoners, O. B. Williams and Lillie Shaver Hendrix, are remanded to jail. And at the same term of said Court, in the custody of the Sheriff of Caldwell County, the said O. B. Williams and Lillie Shaver Hendrix are again brought to the bar of said Court and the following jury of good and lawful men, towit: G. W. Suddreth, and others (naming them), sworn and impanelled to speak of and concerning the premises, upon their oaths, say that said O. B. Williams and Lillie Shaver Hendrix are guilty as charged in the Bill of Indictment.

Upon the coming in of the verdict, the defendants, and each of them, move to set the verdict of the jury aside for the reason that it is contrary to the law in the case and for the further reason that the State offered no evidence impeaching the adjudication of the Nevada Courts as to the good faith of the residence of the defendants in Nevada at the time the divorces were granted.

Motion denied and the defendants, and each of them, except.

Exception No. 2.

The defendants, and each of them, move for arrest of judgment for the reason that the Statute under which these [fol. 5] defendants are indicted is unconstitutional by virtue of the Fourteenth Amendment to the United States Constitution.

Motion in arrest of judgment is denied and the defendants, and each of them, except.

Exception No. 3.

Thereupon the Court imposes Judgment as to each of the defendants as follows:

The judgment of the Court, as to the defendant, O. B. Williams, is that he be imprisoned in the State's Prison at hard labor for not less than one year nor more than three years, the defendant to wear stripes if so required by the prison authorities.

The Judgment of the Court, as to the defendant, Lillie Shaver Hendrix (Lillie Shaver Williams) is that the defendant be imprisoned in the State's Prison for not less than eight months nor more than 24 months, the defendant to wear such uniform as the prison authorities may prescribe.

S. J. Ervin, Jr., Judge Presiding.

The defendants, and each of them, in apt time objected and excepted to the signing of the foregoing judgment.

Exception No. 4.

IN SUPERIOR COURT OF CALDWELL COUNTY

APPEAL ENTRIES

Upon the rendition of the judgment the defendants, and each of them, in apt time except to the said judgment and appeal therefrom to the Supreme Court. Notice of appeal given in open Court. Further notice waived. Appeal bond fixed in the sum of $150.00. Appearance bond fixed in the sum of $1500.00 as to each defendant. The defendants, and each of them, are hereby allowed until the 3rd day of February, 1944 as time in which to prepare and serve statement of case on their said appeal, and the Solicitor for the [fol. 6] State is allowed 40 days after the date of such service as time to file exceptions or serve counter-case.

S. J. Ervin, Jr., Judge Presiding.

IN SUPERIOR COURT OF CALDWELL COUNTY

Statement of Evidence

STATE'S EVIDENCE

It is judicially admitted in open Court by both the State and the defendants that since the previous trial of this action the person designated in the Bill of Indictment as Mrs. O. B. Wike Williams has died.

It is further agreed by the State and the defendants that the evidence of the decedent as taken down by the Court Reporter on the former trial of this action may be offered

in evidence by the State, which evidence at the former trial is as follows:

Mrs. O. B. Williams (at former trial) testified that she was a Wike before marriage; that she now lives four miles East of Granite Falls in Caldwell County; that she was married to O. B. Williams November 30, 1916 in Caldwell County, North Carolina; that they were married by a preacher but did not recall his name; that she and Williams had lived together as husband and wife between 23 and 24 years or until about May 7, 1940; that they raised a family of four children and have not lived together since May 7, 1940; that she has not brought any divorce action against her husband and has secured no divorce from him.

Cross-examination:

That she has a paper that the Sheriff of Caldwell County served on her; that she has read the paper and knew what was in it.

Tom Hendrix testified for the State: That he lived in Wilkes County; that in May, 1940 he lived in Caldwell County; that he was at one time married to Lillie Shaver Hendrix, one of the defendants in this action; that he did not know just when they were married; that it has been [fol. 7] about three years since they separated; that the best he could recollect they were married about 1920; that he and Lillie Shaver Hendrix lived together as husband and wife in Granite Falls, Saw Mills and in Lenoir; that they lived together prior to and up to May 1940; that they are not now living together as husband and wife; that they had lived together as such about 19 years or somewhere about that time; that they were married in Burke County by a preacher but he did not remember who performed the ceremony; that he and the defendant, Lillie Shaver Hendrix, had not secured a divorce before May 1940.

Cross-examination:

I know that my former wife did get a divorce in Nevada. I have since remarried. There were children born to our marriage but none of them are living. That is my signature on the card which you have. I received it and mailed it back.

to Nevada (the card is identified by the witness and marked Exhibit 1).

Redirect examination:

It has been about four months since I remarried. I brought a divorce action against the present Mrs. Williams since the first trial of this case. I brought it in Caldwell County. I have never lived in the State of Nevada. I was born in Wilkes County and have lived in Ohio but I have been back in North Carolina about 20 years. I have never been to the State of Nevada.

Recross-examination:

I was living in Ohio at the time my wife got a divorce from me in Nevada.

Redirect examination:

I had been gone out of North Carolina at the time about a month. I was living in North Carolina at the time my wife left me. I know Mr. Williams and was working for him at that time. I don't know what time he left North Carolina. I don't know when my wife left. I don't know whether [fol. 8] they left at the same time or not. I was working at the store and when I went home at night she was gone. I did not see Mr. Williams or my wife until they came back. They were gone about three months or longer. It was about 7:30 o'clock when I went home and found my wife gone. I don't remember the exact month, but I think it was May, 1940.

OFFER IN EVIDENCE

The State then offered in evidence the Marriage Certificate in words and figures as follows:

99133 33251

STATE OF NEVADA,
County of Clark, ss:

This Is To Certify, That the undersigned C. H. Sloan did on the 4th day of Oct. A. D. 1940, join in lawful wedlock O. B. Williams of Las Vegas, State of Nevada, and Lillie Esther Shaver of Las Vegas, State of Nevada, with their

mutual consent, in the presence of Mrs. Jack Pembroke and Mrs. Charles H. Sloan who were witnesses.

C. H. Sloan, Baptist Minister.

Mrs. Jack Pembroke, Mrs. Charles H. Sloan, Witnesses.

Recorded at the request of C. H. Sloan. Filed Oct. 8, 1940.

David Farnsworth, County Recorder.

RECORDER'S CERTIFICATION.

STATE OF NEVADA,
County of Clark, ss:

I, David Farnsworth, the duly elected, qualified, and acting County Recorder, in and for the County of Clark, State of Nevada, do hereby certify and declare the above (attached) to be a full, true and correct copy of that certain Marriage Certificate of Record in Book 17 of Mar. Cert., Page 369, Clark County, Nevada, Records.

[fol. 9] Witness my hand and official seal this 17th day of February, A. D. 1941.

David Farnsworth, John Beodle, Dep. (Seal.)

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto), do hereby certify that David Farnsworth, whose name is subscribed to the foregoing certificate was, at the time of signing the same, the duly elected, qualified and acting County Recorder in and for the County of Clark, State of Nevada, and authorized to execute said certificate. And I do further certify that the signature of the said David Farnsworth, appearing upon the foregoing certificate is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 18th day of February, 1941.

Lloyd S. Payne (Signed). (Seal.) County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss:

I, George E. Marshall, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the [fol. 10] County of Clark (which Court is a Court of Record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Lloyd S. Payne, as such officer; that the seal annexed thereto is the seal of said District Court; that said Lloyd S. Payne, as such Clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this 18th day of February, A. D., 1941.

George E. Marshall (Signed), Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto), do hereby certify that George E. Marshall, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the District Court of the Eighth Judicial

District of the State of Nevada, in and for the County of Clark, this 18th day of February, 1941.

[fol. 11] Lloyd S. Payne (Signed). (Seal.) County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

L. W. PAYNE testified for the State: I was a Deputy Sheriff in 1940. I went to Pineola, North Carolina, and had a conversation with O. B. Williams and Lillie Shaver Hendrix some time in August, 1940.

Q. What was the conversation you had with them?

Objection by defendants overruled.
Exception by each defendant.

Exception No. 5.

A. It was in Newland where we first saw them. Mr. Teague spoke to them.

Q. Tell what was said?

Objection by defendants—overruled.
Exception by defendants.

Exception No. 6.

A. Charlie Teague was the one that done the talking to them.

Defendants object—overruled—exception.

Exception No. 7.

Q. Was he an officer?

A. Yes, and he and I were together and he spoke to Mrs. Williams and she said her name was Mrs. Williams now.

Defendants object—overruled—exception.
Motion to strike denied—defendants except.

Exception No. 8.

Q. Was the defendant, O. B. Williams, present and close enough to hear her at that time?

Defendants object—overruled—exception.

A. Yes.

Defendants object to each question and answer in regard to this conversation and move to strike the same from the [fol. 12] record; denied and each defendant excepts.

Exception No. 9.

(Witness resumed:) We left Newland. Mr. and Mrs. Williams and Charlie Teague and I and went in an automobile to Pineola.

Q. Tell what all happened when you got to Pineola?

Defendants object—overruled—exception.

Exception No. 10.

A. When we got to Pineola we stopped there where they said they lived.

Objection by defendants—sustained as to "they said."

Q. Who said that?

A. Mr. and Mrs. Williams. We were all together.

Objection by defendants—overruled.

Exception No. 11.

Q. What did Mr. O. B. Williams say to you there?

Defendants object—overruled—exception.

Exception No. 12.

A. Mrs. Williams got out of the car and went down to the house where she and Mr. Williams lived to get some things and she was gone a right long while and Mr. Williams and myself stayed in the car and she said she went to get

Objection by defendants—overruled—exception; motion by defendants to strike; denied; exception by defendants.

Exception No. 13.

Q. Did either of the defendants, in the presence of the other, make any statement as to where they were living at that time?

Objection by defendant—overruled.

Exception No. 14.

A. Yes.

[fol. 13] Q. What did either of them say in the presence of the other?

Objection by defendants—overruled—exception by each defendant.

Exception No. 15.

A. They said they were living there in that house right below where we stopped at Pineola. Motion to strike denied—exception.

Exception No. 16.

Pineola is in Avery County, N. C.

Q. Did either one of the defendants make any statement in the presence of the other as to how long they had been living in Pineola, Avery County, N. C.?

Defendants object—overruled—exception.

Exception No. 17.

A. I don't remember that they made any statement as to how long they had been living there.

Q. Was any other statement made by either of them in the presence of the other?

Defendants object—overruled—exception.

Exception No. 18.

A. They said that that was their home and that they were living right there below where we stopped about 200 yards from the highway.

Defendants object—overruled—exception.

Exception No. 19.

Q. Did you see any dwelling house there?

A. Yes, I saw her going down there and going into the dwelling house.

Objection by defendants and motion to strike; overruled—exception by each defendant.

Exception No. 20.

Q. You may state whether Mrs. Williams made a statement as to whether she and Mr. Williams lived there?

Objection by defendants—overruled—exception.

Exception No. 20A.

A. Yes.

[fol. 14] Question by the Court: Were all of these statements made in the presence of the other?

Objection by defendants—overruled—and the defendants each except.

Exception No. 20B.

A. Yes. I don't believe I remember anything else they said. I had gone to Nevada prior to that time. I went to Nevada and got in Las Vegas the last night of May, 1940, I think. I did not see either one of the defendants there. I did not have any conversation with either of them.

Cross-examination:

I do not mean by that to say they were not there.

Redirect examination:

I have seen O. B. Williams and Lillie Hendrix together since August, 1940 at Granite Falls several times but I don't remember how many. I have seen them riding in their car together. I couldn't say they are living together.

I. N. Vance testified: I lived in Pineola, Avery County, in the summer of 1940. I know the defendants, Mr. and Mrs. Williams. I have seen them together at Pineola. I know where their home is in Pineola. They have been living there for the last few weeks. I don't know exactly the dates but they have been away for a year or more. They are in and out of Pineola. I would say I see them coming and going together but I don't know about where they were going. No one else lives in the house except them. I judge they have owned the property two and a half or three years or possibly a little longer.

Since the defendants have been in Pineloa I have seen them riding in their car, seen them in church and passing

and re-passing. They are together about all the time. I have seen them going in and out of the dwelling. I have never heard them make any statements. I have visited their home once or twice since they moved there. They were together in the home at the times I was there. To the best of my knowledge it was about dark the times I was there. [fol. 15] I have been invited to the home by both Mr. and Mrs. Williams. I don't remember any conversation that was had at the time I would leave. They were just nice and polite and asked me to come back. I was asked to come back by both Mr. and Mrs. Williams. I was a county commissioner of Avery County at that time and hold the same position now. I live in Pineola.

Cross-examination:

I know the general reputation of these parties since they have been in our County and it is good.

T. A. Thompson testified: I lived in Pineola, Avery County, in the Summer of 1940. I know O. B. Williams and Lillie Hendrix. I believe I first knew them the latter part of 1940. I saw them in Pineola. They bought them a home there and it is right at the Baptist church. The lot joins the Baptist church lot. We built a parsonage and they live right next to the parsonage where the preacher is living. I have seen him in the preacher's house and in church and I have been in their home. They have lived there off and on to the best of my knowledge around two and a half years. No one else lives in the house except them. I have never been in their house in the night time. I have been there in the daytime and I have seen them around the church and around in the parsonage.

Q. Did you ever talk to either of them in the presence of the other when they would refer to themselves as being married?

Defendants object—overruled—exception.

Exception No. 21.

A. Yes. These defendants have been living together and for the last month or six weeks in the same house they were living in in the Fall of 1940.

Cross-examination:

I have known the general character and reputation of these parties since they have been in Pineola, and it is good.

[fol. 16] GREEN BUCHANAN testified:-I live in Pineola, Avery County, North Carolina, and I know these two defendants. I met them in 1940. I believe it was a little bit before August, 1940. I just know they have a home in Pineola and are living there together. They have been there off and on about all the time since they moved there. They have been away part of the time. They have been there something like two and a half years.

Cross-examination:

I know the general character and repufation of these parties since they have been in my county, and it is good.

L. W. PAYNE (recaled) testified on Direct Examination:

I cannot recall the exact month that Mr. Teague and myself went to Newland and had a conversation with these defendants. I know it was in the Fall of 1940.

Cross-examination:

I don't know whether I was mistaken awhile ago when I said it was in August or not but I know it was in the fall. I don't know that these people were in Nevada in August. August is not in the fall of the year but it is pretty close to it. There is no other correction I want to make in my testimony.

In response to a question by the Court, the witness stated as follows: I am not definite as to the date. I know it was in the fall but I couldn't say what month.

C. B. TEAGUE testified: I was Chief of Police in 1940. I went with Mr. Payne to Newland some time during 1940. I don't remember the exact date but it was in the fall of the year to the best of my knowledge. I saw Mr. and Mrs.

O. B. Williams. I met Mr. Williams and his wife in a cafe in Newland. Mr. Williams introduced me to his wife and we talked a little while, and I told him my business up there. Mr. and Mrs. Williams were in the car with Mr. Payne. [fol. 17] They did not get in with me. I don't recall hearing Mr. and Mrs. Williams make any statements.

It is judicially admitted in open Court that the person designated as Mrs. O. B. Wike Williams in the Indictment died on June 24, 1943.

The State Rests.

MOTION FOR JUDGMENT AS OF NONSUIT

At the close of the State's evidence the defendants, and each of them, move for judgment as of nonsuit. Motion denied and the defendants, and each of them, in apt time, except.

Exception No. 22.

DEFENDANTS' EVIDENCE

The defendants offered the following evidence:

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

v.

CARRIE ORA WILLIAMS, Defendant

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

1. That in the month of November 1916, in Granite Falls, State of North Carolina, the plaintiff and the defendant inter-married and ever since have been, and now are husband and wife.

2. That plaintiff is now and has been a resident of the State of Nevada for the period of more than six weeks immediately preceding the commencement of this action.

That for more than six weeks immediately preceding the commencement of this action, he has been, and now is a resident of the County of Clark, State of Nevada.

3. That during the term of said marriage the defendant [fol. 18] has been guilty of extreme cruelty toward this plaintiff, by her words, actions, and conduct;

And plaintiff therefore alleges, that during the term of said married life, the defendant has been guilty of extreme cruelty toward this plaintiff.

Wherefore, plaintiff prays judgment against the defendant dissolving the bonds of matrimony now existing between the plaintiff and the defendant, and restoring said parties to the status of single persons.

I. S. Thompson, Attorney for Plaintiff.

STATE OF NEVADA,
County of Clark, ss:

Otis Baxter Williams, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action, and that he has read his foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

Otis Baxter Williams.

Subscribed and sworn to before me, this 26th day of June, 1940. I. S. Thompson, Notary Public. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff

v.

CARRIE ORA WILLIAMS, Defendant

AFFIDAVIT FOR PUBLICATION OF SUMMONS

STATE OF NEVADA,
County of Clark, ss:

Otis Baxter Williams, being first duly sworn, deposes and says that he is the plaintiff in the above entitled suit;

that the complaint in said action has been filed in the Clerk's [fol. 19] office of the above Court and summons thereupon issued; that said action is brought to recover a judgment of the above Court, dissolving the bonds of matrimony now existing between the plaintiff and defendant, on the grounds of extreme cruelty; that such cause of action is more fully set forth in plaintiff's verified complaint on file herein, to which you are referred to for further particulars, and which is hereby made a part of this affidavit; that the defendant is a necessary and proper party defendant in this action.

That the defendant, Carrie Ora Williams, resides outside of the State of Nevada, to-wit: At Granite Falls, North Carolina, and that she is not now and cannot be found in the State of Nevada, and that defendant's present place of residence is Granite Falls, North Carolina.

Affiant therefore says, that personal service of the summons in this action cannot be made upon the defendant, Carrie Ora Williams, and prays for an order that service of the same be made by publication thereof.

Otis Baxter Williams.

Subscribed and sworn to before me this 16th day of July, 1940. I. S. Thompson, Notary Public. Seal.)

In the Eighth Judicial District Court of the State of Nevada in and for Clark County

No. 10650

Otis Baxter Williams, Plaintiff

v.

Carrie Ora Williams, Defendant

Order Directing Publication of Summons

Upon reading and filing the affidavit of Otis Baxter Williams, the plaintiff above named, and it satisfactorily appearing therefrom that the defendant, Carrie Ora Williams, resides out of the State of Nevada and at Granite Falls, North Carolina, and it also appearing from the complaint [fol. 20] herein duly verified by the plaintiff, that good

causes of action exist in this action in favor of the plaintiff, Otis Baxter Williams, and against the defendant, Carrie Ora Williams, and that the defendant, Carrie Ora Williams, is a necessary and proper party defendant thereto; and it further appearing that a summons has been issued out of said court in this cause and that personal service of the same cannot be made upon the defendant, Carrie Ora Williams, for the reasons hereinbefore contained and by the said affidavit made to appear.

On motion of I. S. Thompson, attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendant, Carrie Ora Williams, by publication thereof in the Las Vegas Evening Review Journal, a newspaper published in the City of Las Vegas, County of Clark, State of Nevada, hereby designated as the newspaper most likely to give notice to said defendant, that said publication be made for a period of four weeks, and at least once a week during said time.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at Granite Falls, North Carolina; and her postoffice address is Route 1, Granite Falls, North Carolina; It is ordered and directed that a copy of the summons and complaint in this suit be deposited in the United States Postoffice at the City of Las Vegas, County of Clark, State of Nevada, postpaid, directed to said defendant at her said postoffice address.

Dated this 18th day of July, 1940.

Roger Foley, District Judge.

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark

No. 10650

Otis Baxter Williams, Plaintiff

v.

Carrie Ora Williams, Defendant

Summons

[fol. 21] The State of Nevada Sends Greetings to Said Defendant:

You are hereby summoned to appear within ten days after the service upon you of this summons if served in said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service) and defend the above entitled action.

This action is brought to recover a judgment dissolving the bonds of matrimony that now exist between you and the plaintiff on the grounds of your extreme cruelty toward plaintiff, all of which will more fully appear from plaintiff's verified complaint now on file in this action, to which you are referred for further particulars.

Dated this 26th day of June, A. D. 1940.

Lloyd S. Payne, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada, by Tilla Cronick, Deputy. (Seal.)

I. S. Thompson, Attorney for Plaintiff, Rooms 5 and 6 Griffith Building, Las Vegas, Nevada.

SHERIFF'S RETURN:

STATE OF NEVADA,
County of Clark, ss:

I, J. F. Parlier, the duly elected, qualified and acting Sheriff of said County and State, do hereby certify and return that I received the within summons on the 18th day of July, A. D. 1940, and that I personally served the same upon the within-named defendant, Mrs. O. B. Williams, on the 22nd day of July, A. D., 1940 at Granite Falls, County of Caldwell, State of North Carolina, by then and there delivering to her, the said defendant personally a copy of said Summons attached to a certified copy of the complaint in the within entitled action.

Dated this 22nd day of July, A. D. 1940.

[fol. 22] J. F. Parlier, Sheriff of Caldwell, State of N. C.

STATE OF NORTH CAROLINA,
County of Caldwell, ss:

J. F. Parlier, being first duly sworn, deposes and says:

That he is and was on the day when he served the within summons a citizen of the United States over the age of 21

years, and is not a party to, Attorney in, nor has he any interest in the within entitled action; that he personally served the said sunimons upon Carrie Ora Williams, the within named defendant, on the 22nd day of July, 1940 by delivering to said defendant, on said last named day personally, in the County of Caldwell, State of North Carolina, a true copy of said summons attached to a true copy of the complaint in the within entitled action, duly certified to by the Attorney for the plaintiff therein.

J. F. Parlier.

Subscribed and sworn to before me, this 22nd day of July, 1940. F. H. Hoover, C. S. C. (Seal.)

In the Eighth Judicial District Court of the State of Nevada in and for Clark County

No. 10650

Otis Baxter Williams, Plaintiff,

v.

Carrie Ora Williams, Defendant

Decree of Divorce

The above entitled cause coming on to be heard this day in open court, before the Honorable Roger Foley, Judge presiding in said Court; present Otis Baxter Williams, in person and by his attorney, I. S. Thompson, and the Court having before it all the files, pleadings and papers in this action and being fully advised in the premises and fully satisfied that this action has been regularly commenced: [fol. 23] Finds that the plaintiff has been and now is a bona fide and continuous resident of the County of Clark, State of Nevada, and has been such resident for more than six weeks immediately preceding the commencement of this action; that the defendant has been duly and regularly served with summons in this action in the manner prescribed by law; that an order was made directing the publication of the summons in this case and that thereafter, and on the 22nd day of July, 1940 the defendant was personally served with summons in the County of Caldwell, State of

North Carolina; and that defendant's default has been entered for her failure to appear and answer plaintiff's complaint within the time allowed by law, and the defendant not having appeared for trial in said action, either in person or by attorney; that the Court has complete jurisdiction in the premises, both as to subject matter and to the parties to this action.

Now, therefore, after hearing the witnesses sworn and examined in open court, and the said cause having been submitted and the Court being fully advised in the premises and the Court having fully considered all the evidence in the case, finds that all the averments and allegations contained in plaintiff's complaint are true as therein alleged; that the plaintiff, Otis Baxter Williams, is without fault in the premises and is entitled to a Decree of Divorce from the defendant, Carrie Ora Williams, on the ground of extreme cruelty toward plaintiff.

It is therefore ordered, adjudged and decreed, that the bonds of matrimony now existing between the plaintiff, Otis Baxter Williams, and the defendant, Carrie Ora Williams, be and the same are hereby dissolved; set aside and forever held at naught; And the said parties are absolutely divorced and released from any and all marital obligations each to the other and are hereby restored to the status of single persons.

Done in open Court, this 26th day of August, 1940.

[fol. 24] Roger Foley, District Judge.

In the District Court of the Eighth Judicial District of the State of Nevada, in and for Clark County,

No. 10650

Otis Baxter Williams, Plaintiff,

v.

Carrie Ora Williams, Defendant

Judgment Roll

I, the undersigned County Clerk and Ex-Officio Clerk of the District Court of the Eighth Judicial District in and for

said County and state, do hereby certify that the foregoing is a true copy of the Judgment entered in the above entitled action recorded in Judgment Book 11 of said Court at page 172; and I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and seal of the District Court this 11th day of August, 1940.

Lloyd S. Payne, Clerk, by Sonya Worthy, Deputy.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

v.

CARRIE ORA WILLIAMS, Defendant

PRAECIPE FOR DEFAULT

To the Clerk of the Above Entitled Court:

The defendant above named, Carrie Ora Williams, having been duly and regularly served with process herein, and having failed to appear in said action and having failed to answer or otherwise plead herein, and more than 30 days having elapsed since said service, and being in default, you [fol. 25] are hereby requested and directed to enter the default of said defendant.

Dated this 22nd day of August, 1940.

I. S. Thompson, Atty. for Plaintiff.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff

vs.

CARRIE ORA WILLIAMS, Defendant

DEFAULT

It appearing from the files and records in the above entitled action that Carrie Ora Williams, defendant herein, was duly served with summons on the twenty-second day of July, A. D. 1940, at the County of Caldwell, State of North Carolina, and that more than 30 days, exclusive of the day of service, have expired since said service upon the defendant, and no answer or demurrer having been filed or other defense made by defendant, and no further time having been granted, the default of Carrie Ora Williams, defendant herein, in failing to answer or make defense to plaintiff's complaint, is hereby entered.

Witness my hand and the seal of said Court, this 22nd day of August, A. D. 1940.

Lloyd S. Payne, Clerk. By: Dolores Yturri, Deputy Clerk. (Seal.)

STATE OF NEVADA,
County of Clark, ss.:

I, Lloyd S. Payne, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original:

Complaint, Affidavit, for Publication of Summons, Order Directing Publication of Summons, Summons, Decree of [fol. 26] Divorce, Judgment Roll, Praecipe for Default and Default, together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial

District of the State of Nevada, in and for the County of Clark, this 12th day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark. (Seal.)

STATE OF NEVADA,
County of Clark, ss.:

I, Roger Foley, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal): that the signature to the foregoing certificate and attestation is the genuine signature of the said Lloyd S. Payne, as such officer; that the seal annexed thereto is the seal of said District Court; that said Lloyd S. Payne, as such Clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this 12th day of November, A. D. 1940.

[fol. 27] (Signed): Roger Foley, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss.:

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto) do hereby certify that Roger Foley, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute

said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 12th day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff

vs.

THOMAS GEORGE HENDRIX, Defendant

COMPLAINT

[fol. 28] The plaintiff complains of the defendant and for cause of action alleges:

1. That on June 27, 1920, in Icard, State of North Carolina, the plaintiff and the defendant intermarried and ever since have been and are now wife and husband.

2. That plaintiff is now and has been a resident of the State of Nevada for the period of more than six weeks immediately preceding the commencement of this action.

That for more than six weeks immediately preceding the commencement of this action, she has been, and now is a resident of the County of Clark, State of Nevada.

3. That there is no issue of said marriage.

4. That the defendant has wilfully neglected for the period of over one year, immediately preceding the commencement of this action, to provide plaintiff with the common necessaries of life; although having the ability to do so; that such neglect was and is not the result of poverty on the part of the defendant, which he could not avoid by ordinary industry.

For a Second And Separate Cause Of Action against the defendant, plaintiff alleges:

5. That the allegations set forth in paragraphs I, II and III of the plaintiff's first cause of action are true and are hereby made a part of this cause of action.

6. That during the term of said marriage, the defendant has been guilty of extreme mental cruelty toward this plaintiff by his words, actions, and conduct; and plaintiff therefore alleges that during the term of said married life, the defendant has been guilty of extreme cruelty toward this plaintiff.

Wherefore, plaintiff prays judgment against the defend-[fol. 29] ant dissolving the bonds of matrimony now existing between the plaintiff and the defendant, and restoring said parties to the status of single persons.

I. S. Thompson, Attorney for Plaintiff.

STATE OF NEVADA,
County of Clark, ss.:

Lillie Esther Hendrix, being duly sworn, deposes and says, that she is the plaintiff in the above-entitled action, and that she has read the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge.

Lillie Esther Hendrix.

Subscribed and Sworn to before me this 26th day of June, 1940. I. S. Thompson, Notary Public. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff

vs:

THOMAS GEORGE HENDRIX, Defendant

AFFIDAVIT FOR PUBLICATION OF SUMMONS

STATE OF NEVADA,
County of Clark, ss.:

Lillie Esther Hendrix, being first duly sworn, deposes and says, that she is the plaintiff in the above entitled suit; that

the complaint in said action has been filed with the Clerk of the above Court and summons thereupon issued; that said action is brought to recover a judgment of the above court dissolving the bonds of matrimony now existing between the plaintiff and defendant, on the grounds of willful neglect, and extreme cruelty; that such causes of action are more fully set forth in plaintiff's verified complaint on file herein, to which you are referred to for further particulars and [fol. 30] which is hereby made a part of this affidavit; that the defendant is a necessary and proper party defendant in this action.

The defendant, Thomas George Hendrix, resides outside the State of Nevada, to-wit: at 391 Fuller Street, Akron, Ohio, and that he is not now and cannot be found in the State of Nevada, and that defendant's present place of residence is 391 Fuller Street, Akron, Ohio.

Affiant therefore says, that personal service of the summons in this action cannot be made upon the defendant, Thomas George Hendrix, and prays for an order that service of the same be made by publication thereof.

Lillie Esther Hendrix.

Subscribed and sworn to before me, this 20th day of July, 1940. I. S. Thompson, Notary Public. (Seal.)

In the Eighth Judicial District Court of the State of Nevada in and for Clark County

No. 10651

Lillie Esther Hendrix, Plaintiff

v.

Thomas George Hendrix, Defendant

Order Directing Publication of Summons

Upon reading and filing the affidavit of Lillie Esther Hendrix, the plaintiff above named and it satisfactorily appearing therefrom that the defendant, Thomas George Hendrix, resides out of the State of Nevada and at 391 Fuller Street, Akron, Ohio;

And it also appearing from the complaint herein duly verified by the plaintiff, that good causes of action exist in

this action in favor of the plaintiff, Lillie Esther Hendrix, and against the defendant, Thomas George Hendrix, and that the defendant, Thomas George Hendrix, is a necessary [fol. 31] and proper party defendant thereto; and it further appearing that a summons has been issued out of said court in this cause and that personal service of the same cannot be made upon the defendant, Thomas George Hendrix, for the reasons hereinabove contained, and by the said affidavit made to appear.

On motion of I. S. Thompson, attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendant, Thomas George Hendrix, by publication thereof in the Las Vegas Evening Review Journal, a newspaper published in the City of Las Vegas, County of Clark, State of Nevada, hereby designated as the newspaper most likely to give notice to said defendant, that said publication be made for a period of four weeks and at least once a week during said time.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at 391 Fuller Street, Arkon, Ohio. And that his postoffice address is 391 Fuller Street, Akron, Ohio; it is ordered and directed that a copy of the summons and complaint in this suit be deposited in the United States Postoffice at the City of Las Vegas, County of Clark, State of Nevada, postpaid, directed to said defendant at his said postoffice address.

Dated this 22nd day of July, 1940.

Roger Foley, District Judge.

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark

No. 10651

Lillie Esther Hendrix, Plaintiff

v.

Thomas George Hendrix, Defendant

Summons

The State of Nevada sends Greetings to said defendant:

[fol. 32] You are hereby summoned to appear within ten days after the service upon you of this summons if served in

said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service) and defend the above entitled action.

This action is brought to recover a judgment dissolving the bonds of matrimony that now exist between you and the plaintiff on the grounds of your willful neglect of, and your extreme cruelty toward plaintiff, all of which will more fully appear from plaintiff's verified complaint now on file in this action, to which you are referred for further particulars.

Dated this 26th day of June, A. D. 1940.

Lloyd S. Payne, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada. By: Tilla Cronick, Deputy. (Seal.)

I. S. Thompson, Attorney for Plaintiff, Rooms 5 and 6 Griffith Building, Las Vegas, Nevada.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff

v.

THOMAS GEORGE HENDRIX, Defendant

AFFIDAVIT OF MAILING COPY OF SUMMONS AND COMPLAINT

George W. Thompson, of said county, being duly sworn, says that he is over the age of 21, and is not a party to the above-entitled action.

That on the 26th day of June, 1940 the complaint in said action was filed, and that thereafter an order was made by the court for the publication of the summons in said action, and also a further order that a copy of said complaint and a [fol. 33] copy of said summons should be deposited in the United States Postoffice, at Las Vegas, in said County and State, directed to the defendant, Thomas George Hendrix,

in said action, at his place of residence, to-wit: No. 391 Fuller Street, in the City of Akron, County of Summit, State of Ohio; that to-wit: on the 10th day of August, 1940 and in pursuance of the said order of the Court he, the said affiant, deposited in the United States Postoffice, at the City of Las Vegas, County of Clark, State of Nevada, a true copy of the said summons attached to a true copy of the complaint duly certified to by the attorney for the plaintiff, enclosed in a sealed envelope, directed to Thomas George Hendrix, the said defendant, at No. 391 Fuller Street, in the City of Akron, County of Summit, State of Ohio, the place of his residence as aforesaid, and paid the postage thereon in advance; and that there is a regular communication by the United States mails from said Postoffice of deposit thereof, as aforesaid, to said defendant's said place of residence.

George W. Thompson.

Subscribed and Sworn to before me, this 10th day of August, 1940. I. S. Thompson, Notary Public. (Seal.)

STATE OF NEVADA,
County of Clark, ss.:

Dick Lochrie, being first duly sworn, deposes and says:

That he is foreman of the Las Vegas Evening Review Journal, a daily newspaper of general circulation, printed and published at Las Vegas, in the County of Clark, State of Nevada, and that the attached was continuously published in said newspaper for a period of five weeks from August 7, 1940 to September 4, 1940 inclusive, being the issues of said newspaper for the following dates, to-wit: August 7th, 14th, 21st, 28th, September 4. That said newspaper was regularly issued and circulated on each of the dates above named.

Dick Lochrie.

[fol. 34] Subscribed and sworn to before me this 13th day of Sept. 1940. A. E. Cahlan, Notary Public in and for Clark County, Nevada. My commission expires; Jan. 12, 1943. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff

v.

THOMAS GEORGE HENDRIX, Defendant

SUMMONS

The State of Nevada Sends Greetings to Said Defendant:

You are hereby summoned to appear within ten days after the service upon you of this summons if served in said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service) and defend the above entitled action.

This action is brought to recover a judgment dissolving the bonds of matrimony that now exist between you and the plaintiff on the grounds of your willful neglect of, and your extreme cruelty toward plaintiff, all of which will more fully appear from plaintiff's verified complaint now on file in this action, to which you are referred for further particulars.

Dated this 26th day of June, A. D. 1940.

Lloyd S. Payne, Clerk of the 8th Judicial Dist. Court of the State of Nevada, in and for Clark County, Nevada. By: Tilla Cronick, Deputy. (Seal.)

I. S. Thompson, Rooms 5 and 6 Griffith Building, Las Vegas, Nevada, Atty. for Plaintiff, Aug. 7, 14, 21, 28, Sept. 4.

[fol. 35] Filed Oct. 4, 1940. Lloyd S. Payne, Clerk. By Dolores Yturri, Deputy.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

v.

THOMAS GEORGE HENDRIX, Defendant

DECREE OF DIVORCE

The above entitled cause coming on regularly for hearing this day, in open court, before the Honorable Roger Foley,

Judge of said court, presiding; Present Lillie Esther Hendrix, plaintiff, in person and by her attorney, I. S. Thompson, the defendant not appearing and the Court having before it all the files, pleadings and papers in the action and being fully advised in the premises, finds that this action has been regularly commenced; and that the plaintiff is now and has been a bona fide resident of the County of Clark, State of Nevada, for more than six weeks immediately preceding the commencement of this action; that the defendant has been duly and regularly served with summons in this action in the manner prescribed by law and the order of this court; that after the order was made directing the publication of the summons, the plaintiff used every effort to locate the defendant in order to serve the summons upon him personally but was unable to do so because of his dodging service; that the service of summons was made by publication in the Las Vegas Evening Review Journal, for a period of four weeks and at least once a week during said time; and the default of the defendant has been duly entered for failure to answer plaintiff's complaint within the time allowed by law; and the defendant not having appeared for trial of said action either in person or by attorney and that the court has complete jurisdiction of the matter both as to the subject matter and the parties to the action.

[fol. 36] Now, Therefore, after hearing the witnesses sworn and examined in open court and the said cause having been submitted and the Court being fully advised in the premises and having fully considered all the evidence in the case, finds that all the averments contained in plaintiff's complaint are true as therein alleged; that the plaintiff, Lillie Esther Hendrix, is without fault in the premises, and is entitled to a Decree of Divorce from the defendant, Thomas George Hendrix, on the grounds of his willful neglect of and extreme cruelty toward the plaintiff.

It is Therefore Ordered, Adjudged and Decreed that the contract of marriage now existing between the plaintiff, Lillie Esther Hendrix, and the defendant, Thomas George Hendrix, be, and the same is hereby dissolved, set aside and forever held at naught:

And the said parties are absolutely divorced and released from any and all marital obligations each to the other, and are hereby restored to the status of single persons.

Done in open Court, this 4th day of October, 1940.

Roger Foley, District Judge.

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

v.

THOMAS GEORGE HENDRIX, Defendant

JUDGMENT ROLL

I, the undersigned County Clerk and Ex-Officio Clerk of the District Court of the 8th Judicial District in and for said County and State, do hereby certify that the foregoing is a true copy of the Judgment entered in the above entitled action recorded in Judgment Book 11 of said court [fol. 37] at pages 228-9; and I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and seal of the District Court this 8th day of October, 1940.

Lloyd S. Payne, Clerk, by Lalla Cronick, Deputy.
(Seal.)

IN THE EIGHTH DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

v.

THOMAS GEORGE HENDRIX, Defendant

PRAECIPE FOR DEFAULT

To the Clerk of the Above Entitled Court:

The defendant above named, Thomas George Hendrix, having been duly and regularly served with process herein,

and having failed to appear in said action and having failed to answer or otherwise plead herein, and more than 30 days having elapsed since said service, and being in default, you are hereby requested and directed to enter the default of said defendant.

Dated this 4th day of October, 1940.

I. S. Thompson, Attorney for Plaintiff.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

v.

THOMAS GEORGE HENDRIX, Defendant

DEFAULT

It appearing from the files and records in the above entitled action that Thomas George Hendrix, defendant herein, was duly served with Summons by Publication, and that more than 30 days, exclusive of the day of service, [fol. 38] have expired since said service upon the defendant, and no answer or demurrer having been filed or other defense made by defendant, and no further time having been granted, the default of Thomas George Hendrix defendant herein in failing to answer or make defense to plaintiff's complaint, is hereby entered.

Witness my hand and the seal of said Court this 4th day of October, A. D. 1940.

Lloyd S. Payne, Clerk. By Dolores Yturri, Deputy Clerk.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

v.

THOMAS GEORGE HENDRIX, Defendant

AFFIDAVIT AS TO RESIDENCE OF THE PLAINTIFF

STATE OF NEVADA,
County of Clark, ss:

Lillie Roesselet, being first duly sworn, deposes and says that she is and was, on all the dates hereinafter mentioned, over the age of 21 years; that she is not a party to, nor has she any interest in the above entitled suit; that she resided in the State of Nevada; County of Clark, during the dates and times hereinafter mentioned. That on May 15, 1940 she was residing in, and conducting the Alamo Auto Court on the highway leading from Los Angeles, California, to Las Vegas, Nevada, called the Los Angeles Highway; that on said last named date Lillie Esther Hendrix, the plaintiff above named, came there to live, rented a room and is still living there; that said Lillie Esther Hendrix was present every day, at said place, from the date she came there, May 15, 1940 up to and including June 26, 1940.

Lillie Roesselet.

[fol. 39] Subscribed and sworn to before me, this 16th day of September, 1940. I. S. Thompson, Notary Public. (Seal.)

PLAINTIFF'S EXHIBIT 1—Filed October 4, 1940

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

v.

THOMAS GEORGE HENDRIX, Defendant

AFFIDAVIT OF NON-MILITARY SERVICE OF DEFENDANT

STATE OF NEVADA,
County of Clark, ss:

Lillie Esther Hendrix, being first duly sworn, deposes and says, that she is above the age of majority and is the plaintiff in the above entitled suit and the wife of Thomas George Hendrix, the defendant in the said suit and has been such for more than 20 years last past; that he is above 45 years of age and not subject to draft under the laws of the United States; that she knows of her own knowledge that said Thomas G. Hendrix, defendant, is not now and has not been at any time since 1920, in the military service of the United States or in the militia of the State of North Carolina, where he has resided since 1920, or in the militia of any other state; that he is not now, nor has he been since said marriage to plaintiff, in the service of the United States government in any capacity whatsoever.

Lillie Esther Hendrix.

Subscribed and sworn to before me, this first day of October, 1940. I. S. Thompson, Notary Public. (Seal.)

[fol. 40] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

v.

THOMAS GEORGE HENDRIX, Defendant

EVIDENCE

Before Hon. Roger Foley, District Judge, 9:45 A. M., October 4, 1940.

I. S. Thompson, Esq., Attorney for Plaintiff.

Complaint was filed June 26, 1940. Affidavit and Order for Publication on file. Summons returned. Affidavit of Non-Military Service of Defendant on file. Default entered October 4, 1940.

LILLIE ESTHER HENDRIX was called as a witness in her own behalf, and after being first duly sworn, was examined by Mr. Thompson and testified as follows:

Q. Your name is Lillie Esther Hendrix?
A. Yes.
Q. You are the plaintiff in this case?
A. Yes.
Q. The defendant, Thomas George Hendrix, is your husband?
A. Yes.
Q. You were married June 27, 1920 at Icard, North Carolina?
A. Yes.
Q. Where do you reside?
A. Las Vegas, Nevada.
Q. Las Vegas, Clark County, Nevada?
A. Yes.
Q. You filed your complaint on June 26th, 1940, had you resided here a full six weeks prior to that time?
A. Yes.
Q. When did you come to Clark County, Nevada?
A. May 15, 1940.

Q. What was your object and intention in coming here [fol. 41] at that time?

A. To establish a residence.

Q. Did you establish a residence?

A. Yes.

Q. And that residence was an indefinite permanent residence?

A. Yes, sir.

Q. And from May 15, 1940 down to the day you filed your complaint were you absent from the county or the state?

A. No, sir.

Q. You were here every day?

A. Yes, sir.

Q. Where did you reside during that time?

A. At the Alamo Court.

Q. You were there until after you filed your complaint?

A. Yes.

Q. Are there any children of this marriage?

A. No, sir.

Q. In the fourth paragraph you allege the defendant has wilfully neglected for a period of over one year immediately preceding the commencement of this action to provide plaintiff with the common necessaries of life, although having the ability to do so, and that such neglect is not and was not the result of poverty on the part of the defendant which he could not avoid by ordinary industry—is that true?

A. Yes.

Q. During the past year was your husband well and healthy?

A. Yes.

Q. And able to work?

A. Yes.

Q. And able to earn a living for you and he?

A. Yes.

Q. And he didn't do it?

A. Never.

Q. The sixth paragraph of the complaint alleges that during the term of said marriage the defendant has been guilty of extreme mental cruelty towards this plaintiff by his words, actions and conduct; plaintiff, therefore, alleges that during said married life defendant has been guilty

[fol. 42] of extreme cruelty towards this plaintiff—is that true?

A. Yes.

Q. Now, I will ask you what was his actions toward you when he was home, was he cheerful?

A. No.

Q. Was he moody?

A. Yes.

Q. Did he talk to you or speak to you?

A. Not often.

Q. How about you speaking to him, did he always answer you?

A. Well, most of the time it was a nod or a shake of the head.

Q. There was nothing cheerful about him at all?

A. No, there was not.

Q. Now, when the bills would come in at the end of the month or at any time they would be paid, would he pay them?

A. No, sir, he didn't.

Q. Did your mother and father often have to pay them?

A. They paid money for me.

Q. I will ask you how did these things affect you mentally, his actions in regard to failure to provide for you and these bills coming in, and his moody disposition.

A. It worried me 'till I didn't care whether I lived or did anything.

Q. Did it cause you great mental worry?

A. It certainly did.

Q. And cause you much humiliation?

A. Certainly did.

Q. I will ask you now if you made every effort to get personal service upon the defendant in this case?

A. Yes, I have.

Q. Now, just prior to the commencement of this suit, did you have your attorney write him in regard to the matter?

A. Yes.

Q. And did you ever see that letter or copy of the letter?

A. Yes.

Q. And in the last paragraph after reciting that you [fol. 43] were bringing a suit "Please indicate your willingness to sign such an appearance when it comes to you

by mailing the enclosed postal card." Did you ever see the postal card that was sent in that letter?

A. Yes.

Q. Did he sign that postal card?

A. Yes, sir.

Q. And it was sent to your attorney?

A. Yes, sir.

Q. Do you know whether or not he employed an attorney in North Carolina?

A. Yes.

Q. And a letter came from the attorneys?

A. Yes.

Q. Have you got their names?

A. Yes.

Q. What were their names?

A. L. M. Abernathy.

Q. Abernathy & Caldwell?

A. Mr. Abernathy was the man. Mr. Caldwell is with him.

Q. So your husband had full knowledge of the suit?

A. Yes, he did.

Q. Just before filing your complaint you sent an appearance to him?

A. Yes.

Q. Where he lived in North Carolina?

A. Yes.

Q. You also sent one to Akron, Ohio?

A. Yes.

Q. And one to Darby, North Carolina?

A. Yes.

Q. These were the different places where he was traveling around?

A. Yes.

Q. Did you enclose any money in any of them?

A. Yes.

Q. A dollar in one and fifty cents in another?

A. Yes.

Q. And the purpose of that was to pay the Notary fee?

A. Yes.

Q. Did he ever return that?

A. No.

[fol. 44] Q. And after you had sent the papers to the Sheriff, the summons to be served?

A. Yes.

Q. And the Sheriff couldn't find him?
A. No.

O. B. Williams was called as a witness on behalf of the plaintiff, and after being first duly sworn, was examined by Mr. Thompson and testified as follows:

Q. Will you give your name to the reporter?
A. O. B. Williams.
Q. Where do you live?
A. Clark County, Nevada.
Q. Do you know the plaintiff in this action?
A. Yes, sir.
Q. Do you know whether or not she resided here a full six weeks prior to the commencement of the action?
A. She did.
Q. She testified that she came here——

The Court: I wish the witness be asked whether he knows of his own knowledge of the date.

By Mr. Thompson:

Q. Where were you living on the 15th day of May, 1940?
A. At the Alamo Court, Las Vegas.
Q. When did you first see her at that Court?
A. May 15, 1940.
Q. So that she lived there at that Alamo Court until the day she filed her complaint?
A. Yes, sir.
Q. You saw her every day?
A. Yes, sir.

The Court: That's just the thing I wanted to avoid. I don't want the witness led in regard to the date of residence.

Q. Have you any independent recollection of that, or was it suggested to you by counsel?
A. No, I know the date.
Q. Did you make any record of it?
A. (No response.)

By Mr. Thompson, to the plaintiff:

Q. I will ask you if the landlady who runs the Alamo [fol. 45] Court is here now?

A. No, she is not.
Q. Where did she go?
A. To California.
Q. I will ask you who was the lady who rented the place?
A. Mrs. Lillie Rosetti.

Mr. Thompson: I will offer in addition to Mr. Williams' testimony, the affidavit of Lillie Rosetti, who rented the place, and who is absent from the place.

The Court: It may be admitted in connection with the testimony of the witness.

By the Court:

Q. You are satisfied you first met the lady on the date you testified?
A. Yes.

The Court: Decree to the plaintiff dissolving the marriage between the parties.

I hereby certify that the foregoing is a full, true and correct transcript of my shorthand notes taken in said action.

Marguerite Byler, Court Reporter.

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original: Complaint, Affidavit for Publication of Summons, Order Directing Publication of Summons, Summons, Affidavit of Mailing Copy of [fol. 46] Summons and Complaint, Affidavit of Publication, Decree of Divorce, Judgment Roll, Praecipe for Default, Default, Affidavit as to Residence of Plaintiff, Affiadvit of Non-Military Service of Defendant, Reporter's Transcript in the case entitled: Lillie Esther Hendrix, Plaintiff v. Thomas George Hendrix, Defendant, #10651, together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

In witness whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 23rd day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss:

I, Roger Foley, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal): that the signature to the foregoing certificate and attestation is the genuine signature of the said Lloyd S. Payne, as such officer: that the seal annexed thereto is the seal of said District Court; that said Lloyd S. Payne, as such clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

In witness whereof, I have hereunto set my hand, in my official character as such Judge, at the City of Las Vegas, [fol. 47] County and State aforesaid, this 23rd day of November, A. D., 1940.

Roger Foley, Judge of the District Court of the 8th Judicial District of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the 8th Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto) do hereby certify that Roger Foley, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and

was, duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In witness whereof, I have hereunto set my hand and annexed the seal of the District Court of the 8th Judicial District of the State of Nevada, in and for the County of Clark, this 23rd day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial Dist. Court of the State of Nevada, in and for the County of Clark. (Seal.)

Exemplified certified copy of divorce proceedings entitled Lillie Esther Hendrix v. Thomas George Hendrix, from Clark County State of Nevada. (Admitted in evidence.)

STIPULATION AS TO CERTAIN FACTS

It is judicially admitted in open Court by all parties, that the person designated in the certified copy of the record [fol. 48] from the State of Nevada as Carrie Ora Williams is the same person as the person designated in the indictment as Mrs. O. B. Wike Williams, and that the person designated in the certified copy of the Supreme Court as Lillie Esther Hendrix is the same person as the person designated in the indictment as Lillie Shaver Hendrix, and that the person designated in the same record as Thomas George Hendrix is the same person as the witness, Tom Hendrix.

It is further stipulated in open Court by all parties that the party designated in the record from Clark County, Nevada as Otis Baxter Williams is the same person as the defendant, O. B. Williams.

I. S. Thompson, Attorney at Law, Rooms 5 and 6 Griffith Bldg., Las Vegas, Nevada—Dear Sir: Upon receipt of the original appearance, I will sign the same.

(Signed) Thomas Hendrix.

Defendants rest and renew their motion for judgment as of nonsuit; motion denied; defendants, and each of them, except.

At the close of all of the evidence, the defendants, and each of them, renew their motion for judgment as of non-

suit upon the grounds set forth in a written motion which is as follows:

IN THE SUPERIOR COURT OF CALDWELL COUNTY

STATE OF NORTH CAROLINA

v.

O. B. WILLIAMS and LILLIE SHAVER HENDRIX

MOTION FOR JUDGMENT AS OF NONSUIT

The defendants, and each of them, at the close of the evidence for the State moves the Court that a judgment as of nonsuit be entered in the above entitled matter, and would respectfully show the following:

[fol. 49] 1. That the State has offered no competent evidence establishing fraud in the establishment of their respective residences in the State of Nevada so as to deprive the Nevada courts of jurisdiction of the divorce action instituted in said courts by the defendants herein, the plaintiffs in the Nevada actions; that if such evidence had been adduduced it is incompetent in this cause of action for the reason that the judgments of the Nevada courts cannot be collaterally attacked; that the only remedy would be by motion in the cause in the courts of Nevada where said judgments were rendered.

2. That the portion of Section 4342 of the North Carolina Code 1939 applicable to the offense with which the defendants stand charged is unconstitutional and in violation of Amendment XIV to the Constitution of the United States in that the North Carolina Legislature attempts under and and by virtue of the provisions of said statute to extend the legislative powers of the State of North Carolina beyond the borders of said State and within the political and judicial domain of every other State and decree what shall be lawful divorce decrees and marriages within those States; that the effect of said statute if declared to be constitutional and enforceable will tend to freeze the citizenship of the various States within their respective borders and prevent the free and untrammeled passing and repassing of the citizens of the United States into and from the various States of the Union, all of which is in violation of Amendment XIV of the United States Constitution.

3. That the Supreme Court of North Carolina, having assigned no errors in ordering a new trial in the Superior Court of Caldwell County, there is nothing for the Court to try; that all matters and things have been heretofore adjudicated in the former trial and that such matters and things having been adjudicated and the judgment of the Supreme Court of North Carolina having been reversed by [fol. 50] the Supreme Court of the United States, the opinion of the Supreme Court of the United States is now the law of the case; and *Haddock* v. *Haddock* having been specifically overruled, there is no law upon which to base either a new trial or a conviction of these defendants.

4. That North Carolina is obliged to give full faith and credit to divorce decrees regular on their face and obtained in accordance with the laws of Nevada under the full faith and credit clause of the United States Constitution, Article IV, Section 1.

Wherefore, the defendants, through their counsel, pray the Court that a judgment as of nonsuit be entered and that they go hence without day.

W. H. Strickland, Attorney for Defendants.

Motion denied with respect to each portion of said motion; the defendants, and each of them, in apt time, except.

Exception No. 23.

IN SUPERIOR COURT OF CALDWELL COUNTY

JUDGE'S CHARGE

Gentlemen of the Jury: The defendants, O. B. Williams and Lillie Shaver Hendrix, or Lillie Shaver Williams, are on trial under a Bill of Indictment which charges them with the crime of bigamous cohabitation.

Under the bill of indictment and under the evidence in this case, you may return either one of two different verdicts as to each of the defendants. You may return a verdict finding a particular defendant guilty or a verdict finding such defendant not guilty, depending entirely on which one of such two verdicts you find to be warranted by the law and the evidence in the case.

Answering the charges preferred against them by the State, the defendants have pleaded not guilty and thereby

have denied that they are guilty of the crime with which [fol. 51] they stand charged.

The defendants not only plead not guilty, but when they come into this court and are put upon trial, they are presumed by the law itself to be innocent of the charge set forth in the bill of indictment. This presumption of innocence is a shield or protection which the law throws around every person accused of crime, and this presumption of innocence surrounds an accused at all stages of his trial unless and until the "State by competent evidence rebuts such presumption by satisfying the trial jurors beyond a reasonable doubt that the accused is guilty."

The Court charges you that it is your duty to give to each of the defendants the full benefit of the presumption of innocence, and that you cannot convict a particular defendant of the charge preferred by the State against such defendant unless the State satisfied you beyond a reasonable doubt from the testimony that such particular defendant is guilty of such charge. "In other words, the burden rests upon the State in this case to prove the guilt of a particular defendant beyond a reasonable doubt from the evidence before you can convict such defendant of the crime with which such defendant stands charged."

A reasonable doubt is an actual, honest and substantial misgiving or doubt of guilt, reasonably arising from the evidence or want of evidence, and not a mere possible, captious or ill-founded doubt. When it is said that the trial jurors in a criminal action must be satisfied of the guilt of the accused beyond a reasonable doubt before they can return a verdict of guilty, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charges.

If, after considering, weighing, and comparing all of the evidence in the criminal action, the jury can say that they [fol. 52] have an abiding conviction to a moral certainty in the truth of the charge, then they are satisfied beyond a reasonable doubt, and it is their duty to convict.

On the contrary, however, if, after considering, weighing, and comparing all of the evidence in the criminal action, the minds of the jurors are left in such condition that they cannot say that they have an abiding faith to a moral certainty in the guilt of the accused, then they are not satisfied beyond a reasonable doubt, and it is their duty to give the

accused the benefit of such doubt and to acquit the accused.

Under the law, it is my duty as trial Judge to decide all questions of law and to declare and explain to you the law arising in the case.

It is your duty as trial jurors to accept the law as it is given to you by the trial Judge and to remember and consider all the evidence in ths case in the light of the Court's instructions upon the law and to declare by your verdict what the truth is with respect to the disputed questions of fact.

The law expressly forbids the trial judge to express any opinion as to whether any fact is fully or sufficiently proven. I, therefore, charge you that you are not to consider anything which I may have said in ruling upon matters of evidence, or anything which I may say during the course of this charge, as the expression of any opinion as to any question of fact.

(A) "The crime of bigamous cohabitation was created by a statute enacted by the General Assembly of this State in 1913. This statute is now embodied in Section 4342 of the Consolidated Statutes of North Carolina. Insofar as the same is germane to this case, Section 4342 of the Consolidated Statutes reads as follows: 'If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable [fol. 53] as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases in bigamy. Nothing contained in this section shall extend to any person marrying a second time who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage.'" (B)

Defendants except to the foregoing portion of the charge between the letters (A) and (B).

Exception No. 24.

(C) "A person commits the crime of bigamous cohabitation under this statute if he does both of the following acts under the following circumstances: First: If he marries a second time outside of the State of North Carolina while his spouse by a former marriage is still alive and the former marriage is still in force; and, Second, if he

thereafter cohabits with the spouse by the alleged second marriage in the State of North Carolina." (D)

Defendants except to foregoing portion of the charge between the letters (C) and (D).

Exception No. 25.

(E) "Where the State seeks the conviction of an accused upon a charge of bigamous cohabitation, the State has the burden of proving beyond a reasonable doubt from the evidence four facts, namely: (1) That the Accused was lawfully married to one person; (2) That thereafter the accused contracted a second marriage with another person outside of North Carolina; (3) That the spouse of the accused by the former marriage was living at the time the second marriage was contracted by the accused outside of North Carolina; (4) That after contracting the second marriage outside of North Carolina, the accused cohabited in North Carolina with the person with whom he had contracted such second marriage.

"Where these four facts are shown by the State beyond a reasonable doubt from the testimony in a prosecution [fol. 54] for bigamous cohabitation, the State has made out what the law calls a prima facie case, and is not bound to go further and prove that the former marriage has not been dissolved by divorce, knowledge as to such dissolution being peculiarly within the cognizance of the accused." (F)

Defendants except to the foregoing portion of the charge between the letters (E) and (F).

Exception No. 26.

When the State proves the four facts enumerated by the Court as constituting a prima facie case beyond a reasonable doubt from the testimony, (G) "the burden then devolves upon the accused to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy the trial jury from facts or circumstances offered in evidence either by the State or by the accused or by a co-defendant, that the accused was lawfully divorced from his first spouse at the time of his second marriage, if the accused in the prosecution for bigamous cohabitation relies upon the dissolution of his first marriage by divorce as a defense." (H).

Defendants except to the foregoing portion of the charge between the letters (G) and (H).

Exception No. 27.

Now, the Court has given you certain general principles of law applicable to prosecutions for bigamous cohabitation. The Court desires to instruct you as to making special applications of these general principles of law to the evidence in this case, so that you may arrive at a verdict by considering the evidence in the light of the Court's instructions upon the law.

(I) "The Court instructs you that in the prosecution of the defendant, O. B. Williams, upon the charge of bigamous cohabitation, the law casts upon the State the burden of showing four things beyond a reasonable doubt from the evidence, in order to constitute a prima facie case as against [fol. 55] the defendant, O. B. Williams. These four things are as follows: (1) That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Wike Williams, a woman, before the times named in the bill of indictment; (2) That after his marriage to Mrs. O. B. Wike Williams, namely, on or about the 4th day of October 1940, the defendant, O. B. Williams, contracted a marriage with the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, in the State of Nevada; (3) That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams in the State of Nevada, Mrs. O. B. Wike Williams, his wife by his former marriage, was still living; and (4) That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams and his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, cohabited together in the State of North Carolina." (J)

Defendants except to the foregoing portion of the charge between the letters (I) and (J).

Exception No. 28.

If the State should fail to prove beyond a reasonable doubt from the evidence that each and every one of these four facts co-existed with respect to the defendant, O. B. Williams, then it would be your duty to return a verdict of not guilty as to the defendant, O. B. Williams.

(K) "If the State, however, should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of these four things existed in the case of

O. B. Williams, then it would be your duty to return a verdict finding the defendant, O. B. Williams, guilty of bigamous co-habitation, as charged in the bill of indictment, unless the defendant O. B. Williams, should satisfy you [fol. 56] from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant, that at the time of his alleged marriage to his co-defendant in the State of Nevada, he was lawfully divorced from the bond of his former marriage to Mrs. O. B. Wike Williams, and to do that, upon such finding being made by you, the defendant, O. B. Williams, would have to satisfy you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant, that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County entered the decree of divorce in the suit therein instituted between Otis B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, the defendant, O. B. Williams, had his domicile in the State of Nevada." (L)

Defendants except to the foregoing portion of the charge between the letters (K) and (L).

Exception No. 29.

If the State should satisfy you beyond a reasonable doubt from the evidence that all of the four propositions enumerated by the Court as necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed as to the defendant, O. B. Williams.

(M) "and if the defendant, O. B. Williams, should satisfy you from facts or circumstances in evidence that at the time the Court in Nevada rendered the alleged decree of divorce set forth in the certified copy of the record from the State of Nevada that he, O. B. Williams, had his domicile in the State of Nevada, then it would be your duty to return a verdict of not guilty as to the defendant, O. B. Williams." (N)

Defendants except to the foregoing charge between the letters (M) and (N).

Exception No. 30.

If the State should satisfy you beyond a reasonable doubt from the testimony in this case that each and everyone of the four propositions stated by the Court as being neces- [fol. 57] sary to constitute a prima facie case as against the

defendant, O. B. Williams, co-existed with respect to the defendant, O. B. Williams,

(O) "and the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in evidence that at the time of the rendition of the alleged decree of divorce in the suit between O. B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, in the State of Nevada, the defendant, O. B. Williams, was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams." (P)

Defendants except to the foregoing charge between the letters (O) and (P).

Exception No. 31.

The Court instructs you that in order for the State to make out a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, the State must satisfy you beyond a reasonable doubt, from the evidence in this case of four things, namely:

1. That the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, was lawfully married to Tom Hendrix, a man, before the times named in the bill of indictment.

2. (Q) "That after the marriage between Tom Hendrix and the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, namely, on or about the 4th day of October, 1940 the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contracted a marriage with her co-defendant, O. B. Williams, a man, in the State of Nevada." (R)

Defendants except to the foregoing charge between the letters (Q) and (R).

Exception No. 32.

3. That at the time the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contracted the alleged marriage [fol. 58] with her co-defendant, O. B. Williams, in the State of Nevada, Tom Hendrix, her husband by her former marriage, was still living.

4. That after the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contracted the alleged marriage

with her co-defendant, O. B. Williams, in the State of Nevada, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and her co-defendant, O. B. Williams, cohabited together in the State of North Carolina.

If the State should fail to satisfy you beyond a reasonable doubt that each and everyone of those four things stated by the Court concurred as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, then it would be your duty to return a verdict of not guilty as to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams.

(S) "If the State, on the contrary, however, should satisfy you beyond a reasonable doubt from the testimony that each and every one of those four things enumerated by the Court co-existed with respect to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, then it would be your duty to return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty of bigamous cohabitation, unless the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, should satisfy you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfy you from facts or circumstances offered in evidence either by the State or by herself or by her co-defendant, that at the time of her alleged marriage to her co-defendant, O. B. Williams, in the State of Nevada, she was lawfully divorced from the bond of her alleged first marriage to Tom Hendrix, and to do that, upon such a finding being made by you, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, would have to satisfy you from facts or circumstances offered in evidence [fol. 59] that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County rendered the alleged decree of divorce in a suit therein pending between Lillie Shaver Hendrix or Lillie Esther Hendrix and Thomas George Hendrix, the defendant Lillie Shaver Hendrix or Lillie Shaver Williams had her domicile in the State of Nevada." (T)

Defendants except to the charge embraced between the letters (S) and (T).

Exception No. 33.

The Court charges you that under the law which applies in this case that a State has a right to grant a divorce upon service by publication or upon substituted service in favor of any person who is at the time of the rendition of that decree of divorce domiciled in the State in which the divorce decree is rendered, notwithstanding the fact that the other party to the marriage in question may not be domiciled in that State or may be domiciled in some other State, and cannot be served personally with process in that State and does not enter a general appearance in the Court granting the divorce, and that any other State in the Union is required by the Constitution of the United States to give full faith and credit to such decree of divorce rendered in the State wherein such party is domiciled.

The Court further instructs you, however, that under the law that no State has the power or jurisdiction to grant a divorce in the case of a marriage between parties neither of whom is domiciled in such State, and that whenever the Court in a State undertakes to grant a divorce at the instance of a plaintiff who is not domiciled in such State as against a defendant who is not domiciled in such State and who is not personally served with process therein and who does not enter a general appearance in such Court, the attempted decree of divorce is void and is not entitled to full faith and credit under the Constitution of the United States in any other State.

[Vol. 60] Now, some of the law which arises in this case is the law of Nevada and some of the law which arises in this case is the law of North Carolina. The Legislature of North Carolina passed a statute in 1931, which provides that the courts of North Carolina must take judicial notice of the laws of other states in the United States, when the laws of such states come into question in the courts of North Carolina. This statute means in plain English that it is the duty of the trial Judge to instruct the jury as to what the law of the other State is when it comes into question in the courts of North Carolina.

The Court charges you as a matter of law that the law of the State of Nevada provides that any married person who has had his domicile in the State of Nevada for as lor a period of time as six weeks may bring an action in the courts of the State of Nevada against a spouse residing in some other State, and obtain a divorce from such spouse

upon substituted service, or service by publication, for wilful neglect or for extreme cruelty.

The Court further instructs you that wherever the court in a State where the plaintiff who brings an action for divorce is domiciled, grants a decree of divorce to such plaintiff, and against a non-resident spouse, on a ground recognized as good ground for divorce by the State in which the divorce is granted, but not recognized as a valid ground for divorce in the State in which the non-resident spouse has domicile, and such non-resident spouse is not served with process other than by service by publication or by substituted service, and does not enter a general appearance in the court of the State of the domicile of the plaintiff, a divorce granted by the court of the domicile of the plaintiff is nevertheless valid, and under the Federal Constitution must be recognized as valid in the State of the residence and domicile of the non-resident spouse.

[fol. 61] The Court instructs you further, however, that if a court in a suit in the State of Nevada should grant a divorce to a plaintiff who is not domiciled in Nevada, against a non-resident spouse who is not domiciled in the State of Nevada, and who is not personally served with summons in Nevada, and who does not enter a general appearance in the suit in the court in Nevada, then the divorce granted by the court in Nevada in such instance is void, and is not entitled to full faith and credit in the State in which the non-resident spouse has his or her domicile.

The Court has used the word marriage in the course of its charge. The word marriage may be used to mean either one of two things. It may be used to mean the form or ceremony by which a man and a woman may become man and wife, or it may be used to signify the relation that exists between a man and a woman who have gone through such ceremony.

Nothing else appearing, every person who undertakes to enter into a marriage is presumed to have capacity to enter a valid marriage; and

(U) "therefore the State is not required to prove beyond a reasonable doubt from the testimony that a person entering into an alleged first marriage had the capacity to contract such marriage." (V)

Defendants except to the foregoing charge between the letters (U) and (V).

Exception No. 34.

but the State does have to establish beyond a reasonable doubt from the evidence among other things, that the person who contracted such a marriage was married in accordance with the forms prescribed by law. The Court instructs you that marriage is the relation of husband and wife, and that a marriage in law is complete when parties, able and willing to contract, have actually contracted to be man and wife in the form and with the solemnities required by law.

[fol. 62] The Court further charges you that the word "marriage," when applied to a bigamous marriage, means going through the form of ceremony prescribed by law as the method for contracting marriages.

Now, the Court charges you that under the law of Nevada a minister of the Gospel duly licensed may solemnize marriages, and that no particular form of solemnization is required except that the parties must declare in the presence of the minister of the Gospel duly licensed, performing the ceremony, and two attending witnesses, that they take each other as husband and wife.

The Court instructs you that if the State should satisfy you beyond a reasonable doubt from the evidence in this case that the defendant O. B. Williams and the defendant Lillie Shaver Hendrix or Lillie Shaver Williams procured a license to marry in the State of Nevada and that pursuant to such license they appeared before a minister of the Gospel and two witnesses in Nevada and declared in the presence of such minister and witnesses that they took each other for husband and wife, then you would find that they contracted a marriage in the State of Nevada.

The Court instructs you that under the law of North Carolina that a man and a woman are married when they consent in the presence of each other and in the presence of a person authorized by the law of North Carolina to solemnize marriages that they then and there take each other as husband and wife, and when the person authorized to perform marriages in whose presence they give such consent declares them to be man and wife.

The Court further instructs you that under the law of North Carolina an ordained minister of any religious denomination, or any minister authorized by his church, or any justice of the peace, is authorized to solemnize marriage ceremonies.

[fol. 63] (W) "Now, the Court has told you that the defendants are charged with what is known in law as bigamous cohabitation and during the course of its charge the Court has used and will use the word 'cohabitation' because the statute provides that one of the essential elements of bigamous cohabitation is that the accused must cohabit in the State of North Carolina with the person with whom he is alleged to have contracted a second marriage outside of North Carolina." (X)

Defendants except to the foregoing charge between the letters (W) and (X).

Exception No. 35.

The Court instructs you that a man and a woman cohabit together within the meaning of the law if they dwell together in the same habitation and habitually engage in sexual intercourse with each other.

The Court has heretofore instructed you that the power of a Court in a State to grant divorces in cases where the defendant is a non-resident, that is to say, in cases where the defendant has his or her domicile in another State, and is not personally served with summons in the State where the court sits, and does not enter a general appearance in the divorce suit in such court, is dependent upon the question as to whether or not the State in which the plaintiff in such suit for divorce has his or her residence is the State in which the Court sits.

The Court instructs you that the domicile of a person is that place in which he has voluntarily fixed his abode or habitation, not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.

Domiciles may be divided into domiciles of origin, domiciles of choice, and domiciles by operation of law. There is no evidence in this case tending to show that either of the [fol. 64] defendants had a domicile of origin or a domicile by operation of law in the State of Nevada, and the question of whether or not a particular defendant had his or her

domicile in the State of Nevada is dependent upon whether such defendant had a domicile of choice in Nevada.

The Court instructs you that a domicile of choice is the place which a person has elected and chosen for himself to displace his previous domicile. Domicile of choice is entirely a question of residence and intention. To constitute such a domicile, or to effect a change of domicile, there must appear both an actual residence in a particular locality and an intention to remain there or to make it one's home either permanently or for an indefinite or unlimited length of time. As soon as a point of time is reached when residence and intent concur, the domicile of choice is obtained.

The Court instructs you that if a person who has been domiciled in North Carolina leaves the State of North Carolina and actually resides in the State of Nevada and at the time of his residing in the State of Nevada intends to remain in the State of Nevada or to make it his home either permanently or for an indefinite or unlimited length of time, such person loses his domicile in North Carolina and acquires a new domicile in Nevada.

The Court further instructs you that if a person leaves his home or place of domicile, and resides elsewhere, for a mere temporary or special purpose with and intention to return to his home or domicile, there is no acquisition or change of domicile.

The rule is that a mere temporary absence, however long, from one's fixed home or domicile will not effect a change of domicile.

The Court instructs you that if a person has a domicile in North Carolina, and such person leaves North Carolina and [fol. 65] goes to the State of Nevada simply and solely for the purpose of obtaining a divorce in the State of Nevada, and with the intention of returning to the State of North Carolina when such divorce is obtained, such person never loses his domicile in North Carolina, and never acquires a new domicile in the State of Nevada.

The State relies in part in this case upon what is known in law as circumstantial evidence.

Evidence is of two kinds, direct and circumstantial. Direct evidence is evidence which if believed proves the existence of the fact in issue without any inference or presumption; while circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. While cir-

cumstantial evidence should always be closely and cautiously scanned, circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of gravest moment. The facts, their relations, connections and combinations should be natural, reasonable, clear and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing, and conclusive in its connections and combinations, excluding all rational doubt as to the guilt of the accused. Circumstantial evidence may be of two kinds, consisting either of a number of consecutive links, each depending upon the other; or a number of independent circumstances all pointing in the same direction. In the former case it is said that each link must be complete in itself, and that the resulting chain cannot be stronger than its weakest link. In the latter case, the individual circumstances are compared to the strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the accused beyond a reasonable doubt.

[fol. 66] Circumstantial evidence is not sufficient to justify conviction if the circumstances are consistent with either the hypothesis of innocence or the hypothesis of guilt. To justify inference of guilt the circumstantial evidence must exclude to a moral certainty every other reasonable hypothesis. In order to sustain a conviction on circumstantial evidence all the circumstances proved must be consistent with each other, consistent with the hypothesis that accused is guilty and at the same time inconsistent with the hypothesis that he is innocent and with every other rational hypothesis except that of guilt. In short, if all the material circumstances in evidence point to guilt and exclude any reasonable hypothesis except that of guilt—in other words, if they are inexplicable on the theory of innocence—a conviction is warranted. If all the circumstances proved, taken together, are as compatible with innocence as with guilt, there arises a reasonable doubt, requiring an acquittal. Of two reasonable hypotheses supported by the evidence in a criminal action, it is the jury's duty to adopt the hypothesis of innocence, even though that of guilt is the more probable.

The defendants did not testify in this case. Each of the defendants, however, has elicited evidence on the cross-examination of the State's witnesses tending to show that

the general reputation and character of each of the defendants is good. The Court charges you that you will consider the evidence tending to show that a particular defendant is a person of good reputation and character as substantive evidence tending to establish the innocence of such defendant upon the issue of guilt or innocence.

In deliberating upon the issues joined between the State and the defendants, it is your duty and your province to weigh all of the evidence in every way, and to assign to each portion of the testimony its proper probative force and to draw such inferences from the evidence as you find it will [fol. 67] reasonably and properly bear. You are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining the credit you will give to a witness, and the weight and value which you will attach to a witness' testimony, you will take into consideration the conduct and demeanor of the witness upon the stand; the interest of the witness, if any, in the result of the trial; the motives of the witness, in testifying; the witness' relation to or feeling for, or against the State or the defendants; the probability or the improbability of the witness' testimony; the opportunity the witness had to know and to be informed as to matters concerning which the witness gives evidence; the capacity of the witness to observe and to recollect and to narrate the things embraced in the testimony of the witness; the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of the witness, and the character and reputation of the witness insofar as the character and reputation of the witness is disclosed by the evidence. All of these matters being taken into account, together with all other facts and circumstances in evidence, it is your duty and your province to give each witness such credit and to assign to the testimony of each witness such weight and value as you find proper.

Neither of the defendants has testified in his or her own behalf in this case. The statute provides that an accused in a criminal action has a legal right to testify or to refrain from testifying in his own behalf, as he elects, and that his or her failure to so testify shall not create any presumption against such defendant. The Court instructs you that you are not to consider a particular defendant's failure to testify to his or her prejudice at any stage of this trial.

The State has offered evidence in this case tending to show that on or about the 30th day of November, 1916, the [fol. 68] defendant, O. B. Williams, was married to Mrs. O. B. Wike Williams by a Minister of the Gospel in the County of Caldwell, North Carolina, and that the defendant O. B. Williams and Mrs. O. B. Wike Williams thereafter lived together in Caldwell County, North Carolina, between 23 and 24 years. The State has offered evidence further tending to show that during the period of time that they lived together that the defendant O. B. Williams and Mrs. O. B. Wike Williams had four children, and that the defendant O. B. Williams did not live with Mrs. O. B. Wike Williams subsequent to the 7th day of May, 1940, and that Mrs. O. B. Wike Williams died on the 24th day of June, 1943, and that Mrs. O. B. Wike Williams did not secure a divorce from the defendant, O. B. Williams.

The State has offered evidence tending to show that an officer in Caldwell County served certain papers in an alleged divorce action in the State of Nevada against Mrs. O. B. Wike Williams dated sometime in the month of July, 1940.

The State has offered evidence tending to show that the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, was married in Burke County, North Carolina, by a justice of the peace to one Tom Hendrix or Thomas George Hendrix about 22 or 23 years prior to the time of this trial, and that the defendant Lillie Shaver Hendrix or Lillie Shaver Williams lived with Tom Hendrix in Caldwell County, North Carolina, from the time of the said alleged marriage down to sometime early in the month of May, 1940, and that such defendant has not lived with Tom Hendrix or Thomas George Hendrix since that time.

The State has offered evidence tending to show that there are no living children to the alleged marriage of the witness Tom Hendrix and the feme defendant, and that sometime during the early part of May, 1940, the feme defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and the [fol. 69] defendant, O. B. Williams were seen for the last time for a period of some months by the witness, Tom Hendrix.

The State has offered evidence tending to show and contends that you should find therefrom that the States witness Tom Hendrix, knew the defendants and that he saw them during the early part of the month of May, 1940, in

Caldwell County, North Carolina, and that he did not see them thereafter until sometime about three months later when he saw them again in North Carolina.

The State has offered in evidence an alleged certified copy of a record tending to show that it was certified by the custodian of the original of such record in the State of Nevada that the original of such record recited that C. H. Sloan, a Baptist minister in the State of Nevada, performed a marriage ceremony in the State of Nevada between the defendant, O. B. Williams, and the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, on the 4th day of October, 1940. The State has offered evidence tending to show that sometime during the fall of 1940 that the defendant, O. B. Williams, and the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, were seen together in Pineola, Avery County, North Carolina, and that from that time on for a period of approximately two and a half years subsequent thereto that the defendants were seen together at various times in Pineola, and that they both stayed in the same house there in Pineola, North Carolina, and that no person stayed in the same house except the two defendants,

(Y) "and that on one or more occasions one of the defendants stated in the presence of the other that they were married to each other, and that on one occasion the feme defendant stated that she was now Mrs. Williams."

(Z) Defendants except to foregoing portion of charge between (Y) and (Z)

Exception No. 36.

[fol. 70] The State has offered evidence tending to show and contends that you should find therefrom that the two defendants were seen subsequent to the summer of 1940 driving in an automobile together and were seen on several occasions at different times in the vicinity of Granite Falls in Caldwell County, North Carolina, and were observed together at church and in the home of a minister at Pineola, North Carolina, and in a house which they called their home, and were seen shopping in the stores together in Pineola.

The State perhaps offered other evidence in the case. It is your duty to remember all of the evidence in the case.

and to give due consideration to each and every portion of the evidence when you deliberate on your verdict.

The defendants elicited evidence on the cross-examination of some of the State's witnesses tending to show that while the defendants resided in Pineola, North Carolina, that their general reputations and characters were good.

The defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, offered in evidence a certified copy of the record of a suit between the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, as plaintiff, and Tom Hendrix or Thomas George Hendrix, as defendant; in the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada, showing that according to the recitation in the said record, that the plaintiff in such action, the defendant Lillie Shaver Hendrix or Lillie Shaver Williams in this action, instituted an action in Clark County, Nevada, for the avowed purpose of securing a divorce from Tom Hendrix or Thomas George Hendrix, and showing that Thomas George Hendrix was served with summons in such action by publication in a newspaper in the State of Nevada, in accordance with the provisions of the laws of the State of Nevada, and by mailing a copy of the summons and complaint to Tom Hendrix in the State of Ohio.

[fol. 71] The defendants elicited evidence on the cross-examination of one of the State's witnesses tending to show that at the time of the institution and prosecution of such alleged suit that Tom Hendrix was residing in the State of Ohio. The certified copy of the record offered in evidence by the defendant Lillie Shaver Hendrix or Lillie Shaver Williams further recites and shows that on the 4th day of October, 1940, that the Nevada Court mentioned in such record entered a decree divorcing the plaintiff, the defendant here Lillie Shaver Hendrix or Lillie Shaver Williams, from Thomas George Hendrix upon the ground of willful neglect and extreme cruelty, and reciting further that Thomas George Hendrix had been served with summons by publication in such divorce action and by substituted service by mailing to him in Ohio a copy of the summons and complaint, and reciting that Thomas George Hendrix, the defendant in such divorce suit, had not appeared for trial in such suit either in person or by attorney, and that Thomas George Hendrix, the defendant in such suit, had not been personally served with summons in such divorce action. The certified copy of the record and decree in such suit

further recites that the Nevada court found as a fact that the defendant Lillie Shaver Hendrix or Lillie Shaver Williams, the plaintiff in such suit, had been and was a bona fide resident of the State of Nevada for more than six weeks immediately preceding the bringing of such divorce suit.

The defendant, O. B. Williams, offered in evidence a certified copy of the record of a suit between such defendant, as plaintiff, and Mrs. O. B. Wike Williams, as defendant, in the Eighth Judicial District Court of the State of Nevada, and in and for Clark County, duly certified in accordance with the provisions of the Act of Congress in such cases.

The record offered in evidence by the defendant, O. B. Williams, recites that on or about the 26th day of June, [fol. 72] 1940, O. B. Williams instituted an action against Mrs. O. B. Wike Williams, designated in the record as Mrs. O. B. Williams and Carrie Ora Williams, for the purpose of securing a divorce from her, and that she was served by substituted service by a Deputy Sheriff in Caldwell County, North Carolina. Such record also recites that on the 26th day of August, 1940, the Eighth Judicial District Court in the State of Nevada in and for Clark County entered a decree of divorce in such suit and that such decree of divorce recites that the defendant, O. B. Williams, was found to have been a resident of the County of Clark in the State of Nevada for more than six weeks immediately preceding the beginning of the action, and that the defendant in such suit, Mrs. O. B. Wike Williams, had been served by substituted service in the County of Caldwell, State of North Carolina, and had not appeared in such suit either in person or by attorney. Such certified record further recites that on the 26th day of August, 1940, the Eighth Judicial District Court of Nevada in and for Clark County granted a divorce to the defendant in this action, O. B. Williams divorcing him according to such recitations from the bond of his marriage to Mrs. O. B. Wike Williams, on the ground that the defendant in such divorce action, Mrs. O. B. Wike Williams, had been guilty of willful neglect and extreme cruelty toward O. B. Williams.

The Court instructs you that the recitation in the record of the proceedings in the Nevada Court that Mrs. Lillie Shaver Hendrix or Lillie Shaver Williams had been a bona

fide resident of the State of Nevada for more than six weeks immediately preceding the bringing of her suit there constitutes prima facie evidence that she was a bona fide resident of Nevada domiciled in Nevada during the times recited. By this it is meant that such recitation standing alone is sufficient in itself to warrant you in finding that the defendant Lillie Shaver Hendrix or Lillie Shaver Williams was a bona fide resident of Nevada domiciled in Nevada as recited in such record,

[fol. 73] (AA) "but such recitation does not compel you to make such an inference, for you may find from the evidence that notwithstanding such recitation, the defendant Lillie Shaver Hendrix or Lillie Shaver Williams was not in fact or in truth domiciled in Nevada. The same rule applies to the recitations in the record of the proceedings instituted in Nevada by the defendant, O. B. Williams, and the court here charges you that the recitation in such record to the effect that the defendant, O. B. Williams, was and was found to be a bona fide resident of Nevada for more than six weeks immediately preceding the institution of his action for divorce constitutes prima facie evidence that the defendant, O. B. Williams was a bona fide resident of Nevada domiciled in Nevada at the times recited. By this it is meant that such recitation is sufficient of itself to warrant your finding that the defendant, O. B. Williams was a bona fide resident of Nevada domiciled in Nevada at the times recited in such recitation, but such recitation does not compel you to make such finding, for you may find that nowithstanding such recitation the defendant, O. B. Williams, was not in fact domiciled in the State of Nevada." (BB)

Defendants except to the foregoing charge in parentheses.

Exception No. 37.

On the evidence in this case the State and the defendants make different contentions. The State insists that you ought to find as your verdict from the evidence that both of the defendants are guilty as charged. The State contends that you ought to find from the evidence that the defendant, O. B. Williams, was married by a minister of the Gospel in Caldwell County, North Carolina, to Mrs. O. B. Wike Williams on November 30, 1916. The State

further contends that O. B. Williams and Mrs. O. B. Wike Williams lived together as man and wife in Caldwell County, North Carolina, for 22 or 23 years.

(CC) "and that Caldwell County, North Carolina, was [fol. 74] the domicile of O. B. Williams and Mrs. O. B. Wike Williams." (DD)

Defendants except to the foregoing charge between (CC) and (DD).

Exception No. 38.

The State further contends that thereafter O. B. Williams left his wife, Mrs. O. B. Wike Williams, in Caldwell County, North Carolina, some time in the early part of May, 1940 and that on that very same day his co-defendant, Mrs. Lillie Shaver Hendrix, or Lillie Shaver Williams, also left Caldwell County, North Carolina. The State says and contends that you ought to find that the two defendants appeared in the State of Nevada about the same time, and that both of them employed the same lawyer and instituted actions for divorce.

(EE) "The State contends that you ought to find that the two defendants left their fixed home in Caldwell County, North Carolina, and went to Nevada simply and solely for the purpose of securing divorces in Nevada and with the purpose at all times of returning to North Carolina as soon as they obtained such divorces." (FF)

Defendants except to the foregoing charge between the letters (EE) and (FF).

Exception No. 39.

The State says and contends that you ought to find that the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, was married some twenty-two years ago in Burke County, North Carolina, by a Justice of the Peace, to Thomas George Hendrix, and that she lived with him from that time down to sometime in May 1940, as his wife in Caldwell County, North Carolina, and at other places in North Carolina.

(GG) "but never in the State of Nevada insofar as the evidence discloses." (HH)

Defendants except to the foregoing charge between the letters (GG) and (HH).

Exception No. 40.

[fol. 75] The State further contends that Mrs. Lillie Shaver Hendrix or Lillie Shaver Williams and O. B. Williams instituted actions for divorce in the State of Nevada shortly after their arrival there, and that a decree of divorce was entered in the case brought by O. B. Williams on the 26th day of August, 1940 and that a decree of divorce was entered in the suit brought by Mrs. Lillie Shaver Hendrix or Lillie Shaver Williams on the 4th day of October, 1940 and that on the same day after the last decree of divorce was granted that the two defendants were married to each other in the State of Nevada by a minister, and that a short time thereafter they turned up together, claiming to be husband and wife, at Pineola, North Carolina, and that since they have been claiming to be husband and wife, and that they have lived together in Pineola, North Carolina, in the same house for two and a half years, and that they have been going about together, and that they have been living together as husband and wife.

The State says and contends that you ought to infer from the evidence and circumstances that these two defendants have been living together in North Carolina since they went through a marriage ceremony in Nevada and that you ought to infer from the facts and circumstances that they have been living under the same roof and that they have been claiming to be husband and wife, and that you ought to infer that they have had the opportunity to engage in sexual cohabitation with each other, and that you ought to infer from all the circumstances that they have been cohabiting together sexually over a period of many months. The State contends that the two defendants lived together in the same house and had opportunities to engage in sexual intercourse, and that you ought to find that they did engage in sexual intercourse with each other habitually.

(H) "The State contends that it has shown you as to each defendant beyond a reasonable doubt the four essential ele-[fol. 76] ments necessary to make out a prima facie case as against each of the defendants and insists that you cannot be satisfied that in the time of their marriage to each other in Nevada that the defendants or either of them had been

lawfully divorced from their respective spouses by their former marriages. The State contends that the defendants were domiciled in North Carolina, and went to Nevada merely for the purposes of securing divorces and that they intended at all times to return to North Carolina as soon as they obtained such divorces and that they did return to North Carolina pursuant to their intentions as soon as they obtained divorce decree." (JJ)

Defendants except to the foregoing charge between the letters (II) and (JJ). Exception No. 41.

The defendants, on the contrary, contend that you ought to acquit them. The defendants insist that you ought not to believe the evidence offered by the State and that you ought not to be satisfied beyond a reasonable doubt that any one of the four elements enumerated by the court as constituting a prima facie case existed as to either of the defendants, and that you ought to return a verdict of not guilty as to both of the defendants because the State has failed to carry the burden of proof imposed upon it by law. The defendants insist that the evidence shows that they are not guilty under the law in that the state has failed to establish beyond a reasonable doubt from the evidence in the case that the four essential elements constituting a prima facie case as enumerated by the court existed as to either of them, and that you ought to return a verdict finding the defendants not guilty on that ground.

The defendant, O. B. Williams, contends that it does not appear from the evidence beyond a reasonable doubt that the man that is alleged to have performed the alleged marriage ceremony between him and Mrs. O. B. Wike Williams was an ordained minister of the Gospel, or a minister of the [fol. 77] gospel licensed by his church to perform marriage ceremonies, and that you ought to acquit him upon the ground that the State has failed to show beyond a reasonable doubt that there was any valid marriage between him and his alleged first wife. The defendant, O. B. Williams, further contends that you ought not to find in this case that there is any evidence sufficient to justify you in finding beyond a reasonable doubt from the evidence that the defendant, O. B. Williams and Lillie Shaver Hendrix contracted a second marriage in the State of Nevada, or that they have lived together in the State of North Carolina subsequent to said marriage, or that they cohabited together, even if they

lived in the same habitation, so the defendant, O. B. Williams, contends that you ought not to convict him upon the ground that the State has failed to establish beyond a reasonable doubt from the testimony that the four essential elements as enumerated by the Court as constituting a prima facie case have been established and that the State has not made out a prima facie case as against such defendant.

The defendant, O. B. Williams, contends that even if you should find beyond a reasonable doubt from the evidence that the essential elements necessary to constitute a prima facie case have been established by the State that still you ought to return a verdict of not guilty because all of the facts and circumstances show that he was domiciled in the State of Nevada at the time he obtained a decree of divorce from Mrs. O. B. Wike Williams, and contends that although the evidence may have shown that he lived in Caldwell County, North Carolina, that the evidence shows that he left the State of North Carolina and went to the State of Nevada and was physically present in the State of Nevada, and that there is no evidence whatever in this case that indicates that he ever at any time had any intention of living anywhere in the world except in the State of Nevada, and that the courts in the State of Nevada found as a fact that [fol. 78] he was a resident of the State of Nevada, and that he had lived in Nevada for six weeks prior to the time he brought the suit for divorce, and that at that time he intended to remain in Nevada for an indefinite or unlimited period of time, and that he had acquired a domicile in the State of Nevada, and that the State of Nevada had the lawful right and power to dissolve his alleged marriage with his first wife, and that by virtue of his domicile in the State of Nevada, and that by virtue of his decree of divorce in the State of Nevada, he was lawfully divorced from his alleged first wife, and that you should return a verdict of not guilty upon the ground that he has established as an affirmative fact from the evidence that his alleged marriage to his alleged first wife, even if there had been such valid marriage, was not in force at the time of his alleged second marriage to his co-defendant because he had obtained a decree of divorce in the State of Nevada, in which State he was lawfully domiciled.

The defendant, O. B. Williams, contends that the only evidence in this case offered by the State in which the State seeks to show that he did not acquire a residence or domicile

in the State of Nevada is evidence that he came back to North Carolina afterwards and quitted the State of Nevada, and the defendant contends that he came to an entirely different place from any that he had ever lived in the State, and bought a home, and that he came back to North Carolina because he changed his mind after he had acquired a permanent residence or domicile in the State of Nevada, and that you ought to so find, and that you ought not to infer that he had any intention of coming back to North Carolina at the time he procured the decree of divorce in the State of Nevada, and contends that the State has not established or shown the four essential elements enumerated by the Court as constituting a prima facie case, but contends that even if the State has proven such four essential elements, that nevertheless you ought to return a verdict of not guilty, be-
[fol. 79] cause he has established to your satisfaction by facts and circumstances that he had acquired a residence in the State of Nevada at the time of obtaining his decree of divorce, and was domiciled in the State of Nevada, and that the State of Nevada had a legal right to grant a divorce in the State in which he had acquired his domicile.

The defendant, Lillie Shaver Hendrix, or Lillie Shaver Williams, contends that you ought not to find from the evidence beyond a reasonable doubt that she was ever legally married to Thomas Hendrix. She contends that Tom Hendrix testified that some man whom he did not know, was a Justice of the Peace, and that he did not know who he claimed to have been, married them, and that you ought not to believe a man is married to a certain woman if he does not know who performed the ceremony, and does not know when it was performed, at least that you ought to have a reasonable doubt as to whether or not there was any valid marriage between her and Tom Hendrix, and that you ought to acquit her on that ground if upon no other.

The defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contends that even if you should find that she was married to Tom Hendrix, and if even you should find that she did not acquire any residence or domicile in the State of Nevada, and even if you should find she was married to the defendant, O. B. Williams, and returned to the State of North Carolina, that you cannot say beyond a reasonable doubt from the evidence in this case that she ever cohabited with the defendant, O. B. Williams, in North Carolina, and that the only evidence tending to show that is purely cir-

cumstantial evidence, and that the evidence is consistent with her innocence, and that you ought to give her the benefit of the doubt and say that you are not satisfied beyond a reasonable doubt or to a moral certainty that she did in fact cohabit with him, and that you ought to acquit her on that ground.

[fol. 80] The defendant, Lillie Shaver Hendrix, or Lillie Shaver Williams, contends that even if you should find beyond a reasonable doubt that all four of the elements enumerated by the Court as necessary to constitute a prima facie case have been established from the evidence, that still you ought to acquit her on the ground that she was lawfully domiciled in the State of Nevada, and that she was lawfully divorced from Tom Hendrix in the State of Nevada.

The defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contends that after she left the State of North Carolina in May 1940, and went to the State of Nevada, that she instituted an action in the courts in the State of Nevada, and that the Court found as a fact that she was domiciled in the State of Nevada, and had a bona fide residence in the State of Nevada, for six weeks before she obtained her divorce in Nevada, and that she intended to remain in Nevada and to make her home there, for an indefinite period of time, and contends that the fact that she later returned to North Carolina was due to the fact that she changed her mind, and does not justify you in finding that she had any intention to return to North Carolina, and that you ought to find as an affirmative fact from all of the evidence in this case that when she went to Nevada and obtained a decree of divorce, that she intended to make Nevada her home, if not permanently, at least for an indefinite and unlimited length of time, and that she did not have any intention of returning to North Carolina, and she contends that upon a fair consideration of all the evidence that you ought to find that the State has failed to establish beyond a reasonable doubt that the four elements necessary to constitute a prima facie case as against her existed.

She further contends that you ought to say that you are satisfied from all the facts and circumstances in the evidence that she was lawfully divorced from her alleged first [fol. 81] husband in the State of Nevada, and that she was domiciled in the State of Nevada, and that you ought to acquit her.

It is a question of fact for you gentlemen. The Court instructs you that if the State has failed to satisfy you beyond a reasonable doubt that each and every one of the four essential elements heretofore enumerated by the Court as constituting a prima facie case with respect to the defendant, O. B. Williams, existed as to the defendant, O. B. Williams, then it would be your duty to return a verdict of not guilty as to the defendant, O. B. Williams.

(KK) "The court instructs you that if you should be satisfied from the evidence beyond a reasonable doubt that each and every one of the following four elements existed with respect to the defendant, O. B. Williams, namely:

1. That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Williams, a woman, before the times named in the bill of indictment;

2. That after the marriage between the defendant, O. B. Williams, and Mrs. O. B. Wike Williams, namely on the 4th day of October 1940, the defendant, O. B. Williams, contracted a marriage with the defendant, Lillie Shaver Hendrix, a woman, in the State of Nevada.

3. That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, Mrs. O. B. Wike Williams, his wife by a former marriage, was still living;

4. That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams, and his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, cohabited to-
[fol. 82] gether in the State of North Carolina, then you will return a verdict finding the defendant, O. B. Williams, guilty of bigamous cohabitation, as charged in the bill of indictment, unless the defendant, O. B. Williams, satisfies you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant that at the time the Eighth Judicial District Court in the State of Nevada in and for Clark County granted a decree of divorce in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada." (LL)

Defendants except to the foregoing charge between the letters (KK) and (LL).

Exception No. 42.

(MM) "If the State should satisfy you beyond a reasonable doubt from the evidence in the case that all four of the essential elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant O. B. Williams, and if the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in the evidence that at the time the Eighth Judicial District Court in the State of Nevada rendered the decree of divorce in his favor in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams.

If the State should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of the four essential elements enumerated by the Court as necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant, O. B. Williams, and if the defendant, O. B. Williams, has satisfied you from the facts and circumstances offered in evidence, either by the State or by himself or by his co-defendant, that at the time the Eighth Judicial District Court in the State of Nevada in and for [fol. 83] Clark County rendered a decree of divorce in his favor and against Mrs. O. B. Wike Williams he was domiciled in the State of Nevada, then you would return a verdict of not guilty as to the defendant, O. B. Williams." (NN)

Defendants except to the foregoing charge between the letters (MM) and (NN).

Exception No. 43.

The Court instructs you that you can return any one of two different verdicts as to the defendant, O. B. Williams. You can return a verdict finding the defendant, O. B. Williams, guilty, or you may find the defendant, O. B. Williams, not guilty, depending entirely upon which of the two verdicts you find to be warranted by the law and the evidence.

The Court instructs you that if the State should fail to satisfy you beyond a reasonable doubt from the evidence

that each and every one of the four essential elements enumerated by the Court as being necessary to constitute a prima facie case against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams existed as to such defendant, then you would return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, not guilty.

(OO) "The Court instructs you, however, that if the State has satisfied you from the evidence in the case beyond a reasonable doubt that these four essential elements existed as to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, namely:

1. That the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, was lawfully married to Tom Hendrix, a man, before the times named in the bill of indictment;

2. That after the marriage between the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and Tom Hendrix, namely on or about the 4th day of October 1940, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, [fol. 84] contracted a marriage with her co-defendant, O. B. Williams, in the State of Nevada;

3. That at the time the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted a marriage with her co-defendant, O. B. Williams in the State of Nevada, Tom Hendrix, her husband by a former marriage, was still living;

4. That after the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted the alleged marriage with her co-defendant, O. B. Williams, in the State of Nevada, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and her co-defendant, O. B. Williams, cohabited together in the State of North Carolina—then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty as charged in the bill of indictment, unless the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, satisfies you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfies you from facts or circumstances offered in evidence, either by the State or by herself or by her co-defendant, that at the time the Eighth Judicial District

Court of the State of Nevada in and for Clark County, Nevada, rendered the decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix that she was domiciled in the State of Nevada." (PP)

Defendants except to the foregoing charge between the letters (OO) and (PP).

Exception No. 44.

(QQ) "The Court instructs you that if the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, existed as to such defendant, and if the defendant, Lillie Shaver Hendrix or [fol. 85] Lillie Shaver Williams, has failed to satisfy you from facts or circumstances in evidence that she was domiciled in the State of Nevada at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty as charged in the bill of indictment." (RR)

Defendants except to the foregoing charge between (QQ) and (RR).

Exception No. 45.

(SS) "If the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and if the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, has satisfied you from facts or circumstances in evidence that she was domiciled in the State of Nevada at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, not guilty." (TT)

Defendants except to the foregoing charge between (SS) and (TT).

Exception No. 46.

You may now retire and deliberate upon your verdict.

The foregoing is respectfully submitted as the case on appeal in that certain action entitled State v. O. B. Williams and Lillie Shaver Hendrix.

This 22nd day of January, 1944.

W. H. Strickland, Attorney for Defendants.

[fol. 86] Service of the foregoing case on appeal is hereby accepted and receipt of a copy thereof duly acknowledged.

This 22nd day of January, 1944.

L. S. Spurling, Solicitor for the 16th Judicial District.

In Superior Court of Caldwell County

Assignments of Error

Assignment of Error No. 1:

The defendants, and each of them, assign as error the ruling of the Court in overruling their special appearance and motion to dismiss as follows:

[Title omitted]

Special Appearance and Motion to Dismiss

Now come the defendants, through their counsel, W. H. Strickland, and enter this their special appearance and motion to dismiss and would respectfully show unto the court the following:

1

A. That the defendants, and each of them, have heretofore been placed in jeopardy of their liberty and that the identical cause of action has been prosecuted through the Supreme Court of the United States wherein an opinion was rendered as reported in Vol. 87, Lawyers' Edition, at page 189, wherein the judgment of the Supreme Court of North Carolina was reversed and the defendants set at liberty, said Supreme Court of the United States, specifically overruling Haddock v. Haddock, 201 U. S. 562, the

former decision of said Court upon which the North Carolina Supreme Court affirmed a conviction of said defendants.

[fol. 87] 2

B. That the action of the Supreme Court of North Carolina remanding said cause to the Superior Court of Caldwell County for a new trial is not consistent with the opinion of the Supreme Court of the United States above referred to for the reason that the majority opinion closed as follows: "Haddock v. Haddock is overruled. The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion.

It is so ordered."

3

C. That the Supreme Court of North Carolina failed and refused to reverse its judgment as directed by the Supreme Court of the United States but on the contrary 'vacated' its judgment, it being the contention of the defendants that the Supreme Court of North Carolina having 'vacated' its judgment that it was without authority thereafter to direct a new trial.

4

D. That the Supreme Court of North Carolina ordered a new trial of the defendants without assigning any errors committed by the Superior Court of Caldwell County, and that, therefore, the opinion of the United States Supreme Court hereinbefore referred to constitutes the law of the case and is binding upon the State of North Carolina as well as the defendants.

Wherefore, the defendants through their counsel pray the Court on this their special appearance that said cause of action be dismissed on the grounds of former jeopardy and the other grounds herein specifically set out. (R. p. 3).

Assignment of Error No. 2: (R. p. 4):

The defendants, and each of them, assign as error the overruling of their motion to set aside the verdict of the [fol. 88] jury for the reasons stated in their motion.

Assignment of Error No. 3 (R. p. 5):

The defendants and each of them, assign as error the refusal of the Court to allow their motion in arrest of judgment for the reason that the statute, to-wit: Section 4342 of the North Carolina Code, under which said defendants were tried and convicted, is unconstitutional by virtue of the 14th Amendment to the United States Constitution.

Assignment of Error No. 4 (R. p. 5):

The defendants and each of them, assign as error the judgment rendered against them imposing prison sentences for the reason that said judgment is contrary to the former decision of the United States Supreme Court in this identical case.

Assignment of Error No. 5 (R. p. 11):

The defendants, and each of them, assign as error the following question and answer:

Q. What was the conversation with them?
A. It was in Newland where we first saw him. Mr. Teague spoke to them.

Assignments of Error Nos. 6 and 7 (R. p. 11):

The defendants, and each of them, assign as error the following question and answer:

Q. Tell what was said?
A. Charlie Teague was the one that done the talking to them.

Assignment of Error No. 8 (R. p. 11):

The defendants, and each of them, assign as error the following question and answer:

Q. Was he an officer?
A. Yes, and he and I were together and he spoke to Mrs. Williams and she said her name was Mrs. Williams now.

Assignment of Error No. 8A: The defendants, and each of them assign as error the following question and answer:

Q. Was the defendant, O. B. Williams, present and close [fol. 89] enough to hear her at that time?
A. Yes. (R. p. 12).

Assignment of Error No. 9 (R. p. 12):

The defendants, and each of them, assign as error the admission over their objections the following evidence:

"We left Newland, Mr. and Mrs. Williams and Charlie Teague and I went in an automobile to Pineola."

Assignment of Error No. 10 (R. p. 12):

The defendants, and each of them, assign as error the following question and answer:

Q. Tell what all happened when you got to Pineola?'
A. When we got to Pineola we stopped there where they said they lived.

Assignment of Error No. 11 (R. p. 12):

The defendants, and each of them, assign as error the following question and answer:

Q. Who said that?
A. Mr. and Mrs. Williams. We were all together.

Assignment of Error No. 12 (R. p. 12):

The defendants, and each of them, assign as error the following question and answer:

Q. What did Mr. O. B. Williams say to you there?
A. Mrs. Williams got out of the car and went down to the house where she and Mr. Williams lived to get some things, and she was gone a right long while, and Mr. Williams and myself stayed in the car and she said she went to get ——.

Assignment of Error Nos. 13 and 14 (R. p. 12):

The defendants, and each of them, assign as error the following question and answer:

Q. Did either of the defendants, in the presence of the other, make any statement as to where they were living at that time?
A. Yes.

Assignment of Error No. 15 (R. p. 13):

The defendants, and each of them, assign as error the fol- [fol. 90] lowing question and answer:

Q. What did either of them say in the presence of the other?

A. They said they were living there in that house right below where we stopped at Pineola.

Assignment of Error No. 16 (R. p. 13):

The defendants, and each of them, assign as error the refusal of the Court to allow their motion to strike from the record the answer quoted immediately above.

Assignment of Error No. 17 (R. p. 13):

The defendants, and each of them, assign as error the following question and answer:

Q. Did either one of the defendants make any statement in the presence of the other as to how long they had been living in Pineola, Avery County?

A. I don't remember that they made any statement as to how long they had been living there.

Assignments of Error Nos. 18 & 19 (R. p. 13):

The defendants, and each of them assign as error the following question and answer:

Q. Was any other statement made by either of them in the presence of each other?

A. They said that that was their home and that they were living right there below where we stopped about 200 yards from the highway.

Assignment of Error No. 20 (R. p. 13):

The defendants, and each of them, assign as error the following question and answer:

Q. Did you see any dwelling house there?

A. Yes, I saw her going down there and going into the house.

Assignment of Error No. 20A (R. p. 13):

The defendants, and each of them, assign as error the following question and answer:

Q. You may state whether Mrs. Williams made a statement as to whether she and Mr. Williams lived there?

A. Yes.

Assignment of Error No. 20B (R. p. 14):

[fol. 91] The defendants, and each of them, assign as error the following question and answer propounded by the Court:

Q. Were all of those statements made in the presence of the other?

A. Yes.

Assignment of Error No. 21 (R. p. 15):

The defendants, and each of them, assign as error the following question and answer:

Q. Did you ever talk to either one of them in the presence of the other when they would refer to themselves as being married?

A. Yes. These defendants had been living together there for the last month or six weeks in the same house they were living in in the Fall of 1940.

Assignment of Error No. 22 (R. p. 17):

The defendants, and each of them, assign as error the ruling of the court in overruling their motion for judgment as of nonsuit at the close of the State's evidence.

Assignment of Error No. 23 (R. p. 50):

The defendants, and each of them, assign as error the refusal of the Court to allow their written motion for judgment as of nonsuit at the close of all the evidence in the following manner:

Motion for Judgment as of Nonsuit:

The defendants, and each of them, at the close of the evidence for the State move the Court that a judgment as of nonsuit be entered in the above entitled matter, and would respectfully show the following:

1. That the State has offered no competent evidence establishing fraud in the establishment of their respective residences in the State of Nevada so as to deprive the Ne-

vada courts of jurisdiction of the divorce action instituted in said courts by the defendants herein, the plaintiffs in the Nevada actions; that if such evidence has been adduced it is incompetent in this cause of action for the reason that the [fol. 92] judgments of the Nevada courts cannot be collaterally attacked; that the only remedy would be by motion in the cause in the courts of Nevada where said judgments were rendered.

2. That the portion of Section 4342 of the North Carolina Code 1939, applicable to the offense with which the defendants stand charged is unconstitutional and in violation of Amendment XIV to the Constitution of the United States in that the North Carolina Legislature attempts under and by virtue of the provisions of said statute to extend the legislative powers of the State of North Carolina beyond the borders of said State and within the political and judicial domain of every other State and decree what shall be lawful divorce decrees and marriages within those States; that the effect of said statute if declared to be constitutional and enforceable will tend to freeze the citizenship of the various States within their respective borders and prevent the free and untrammeled passing and repassing of the citizens of the United States into and from the various States of the Union, all of which is in violation of Amendment XIV of the United States Constitution.

3. That the Supreme Court of North Carolina, having assigned no errors in ordering a new trial in the Superior Court of Caldwell County, there is nothing for the court to try; that all matters and things have been heretofore adjudicated in the former trial and that such matters and things having been adjudicated and the judgment of the Supreme Court of North Carolina, having been reversed by the Supreme Court of the United States, the opinion of the Supreme Court of the United States is now the law of the case; and Haddock v. Haddock having been specifically overruled, there is no law upon which to base either a new trial or a conviction of these defendants.

4. That North Carolina is obliged to give full faith and [fol. 93] credit to divorce decrees regular on their face and obtained in accordance with the laws of Nevada under the full faith and credit clause of the United States Constitution, Article IV, Section I.

Wherefore, the defendants, through their counsel, pray the court that a judgment as of nonsuit be entered and that they go hence without day.'

W. H. Strickland, Attorney for Defendants.

Assignment of Error No. 24 (R. p. 53):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters A to B, which is as follows:

"The crime of bigamous cohabitation was created by a statute enacted by the General Assembly of this State in 1913. This statute is now embodied in Section 4342 of the Consolidated Statutes of North Carolina. Insofar as the same is germane to this case, Section 4342 of the Consolidated Statutes reads as follows: 'If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases in bigamy. Nothing contained in this section shall extend to any person marrying a second time who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage.'"

Assignment of Error No. 25 (R. p. 53):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters C to D, as follows:

"A person commits the crime of bigamous cohabitation under this statute if he does both of the following acts under the following circumstances: First, if he marries a [fol. 94] second time outside of the State of North Carolina while his spouse by a former marriage is still alive and the former marriage is still in force; and, Second, if he thereafter cohabits with the spouse by the alleged second marriage in the State of North Carolina."

Assignment of Error No. 26 (R. p. 54):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters E to F, which is as follows:

"Where the State seeks the conviction of an accused upon a charge of bigamous cohabitation, the State has the burden of proving beyond a reasonable doubt from the evidence four facts, namely: (1) That the accused was lawfully married to one person; (2) That thereafter the accused contracted a second marriage with another person outside of North Carolina; (3) That the spouse of the accused by the former marriage was living at the time the second marriage was contracted by the accused outside of North Carolina; (4) That after contracting the second marriage outside of North Carolina, the accused cohabited in North Carolina with the person with whom he had contracted such second marriage.

"Where these four facts are shown by the State beyond a reasonable doubt from the testimony in a prosecution for bigamous cohabitation, the State has made out what the law calls a prima facie case, and is not bound to go further and prove that the former marriage has not been dissolved by divorce, knowledge as to such dissolution being peculiarly within the cognizance of the accused."

Assignment of Error No. 27 (R. p. 54):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters G to H, which is as follows:

"When the State proves the four facts enumerated by the Court as constituting a prima facie case beyond a rea- [fol. 95] sonable doubt from the testimony, the burden then devolves upon the accused to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy the trial jury from facts or circumstances offered in evidence either by the State or by the accused or by a co-defendant, that the accused was lawfully divorced from his first spouse at the time of his second marriage, if the accused in the prosecution for bigamous cohabitation relies upon the dissolution of his first marriage by divorce as a defense."

Assignment of Error No. 28 (R. p. 55):

The defendants, and each of them, assign as error that portion of the Court's charge embraced within the letters I to J, which is as follows:

"The Court instructs you that in the prosecution of the defendant, O. B. Williams, upon the charge of bigamous cohabitation, the law casts upon the State the burden of showing four things beyond a reasonable doubt from the evidence, in order to constitute a prima facie case as against the defendant, O. B. Williams. These four things are as follows: (1) That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Wike Williams, a woman, before the times named in the bill of indictment; (2) That after his marriage to Mrs. O. B. Wike Williams, namely, on or about the 4th day of October, 1940 the defendant, O. B. Williams, contracted a marriage with the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, in the State of Nevada; (3) That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, Mrs. O. B. Wike Williams, his wife by his former marriage, was still living; and (4) That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams, and his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, cohabited together in the State of North Carolina."

[fol. 96] Assignment of Error No. 29 (R. p. 56):

The defendants, and each of them assign as error that portion of the Court's charge embraced within the letters K to L, which is as follows:

"If the State, however, should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of these four things existed in the case of O. B. Williams, then it would be your duty to return a verdict finding the defendant, O. B. Williams, guilty of bigamous cohabitation, as charged in the bill of indictment, unless the defendant, O. B. Williams, should satisfy you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant, that at the time of his alleged marriage to his co-defendant in the State of Nevada, he was lawfully divorced from the bond of his former marriage to Mrs. O. B. Wike Williams, and to do that, upon such finding being made by you, the defendant,

O. B. Williams, would have to satisfy you from facts or circumstances offered in evidence, either by the State or by himself or by his co-defendant, that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County entered the decree of divorce in the suit therein instituted between Otis B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, the defendant, O. B. Williams, had his domicile in the State of Nevada."

Assignment of Error No. 30 (R. p. 56):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters M to N, which is as follows:

"and if the defendant, O. B. Williams, should satisfy you from facts or circumstances in evidence that at the time the Court in Nevada rendered the alleged decree of divorce set forth in the certified copy of the record from the State of Nevada that he, O. B. Williams, had his domicile in the [fol. 97] State of Nevada, then it would be your duty to return a verdict of not guilty as to the defendant, O. B. Williams."

Assignment of Error No. 31 (R. p. 57):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters O to P, which is as follows:

"and the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in evidence that at the time of the rendition of the alleged decree of divorce in the suit between O. B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, in the State of Nevada, the defendant, O. B. Williams, was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams."

Assignment of Error No. 32 (R. p. 57):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters Q to R, which is as follows:

"That after the marriage between Tom Hendrix and the defendant, Lillie Shaver Hendrix or Lillie Shaver Wil-

liams, namely, on or about the 4th day of October, 1940 the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted a marriage with her co-defendant, O. B. Williams, a man, in the State of Nevada."

Assignment of Error No. 33 (R. p. 59):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters S to T, which is as follows:

"If the State, on the contrary, however, should satisfy you beyond a reasonable doubt from the testimony that each and every one of those four things enumerated by the court co-existed with respect to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, then it would be your [fol. 98] duty to return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty of bigamous cohabitation, unless the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, should satisfy you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfy you from facts or circumstances offered in evidence either by the State or by herself or by her co-defendant, that at the time of her alleged marriage to her co-defendant, O. B. Williams, in the State of Nevada, she was lawfully divorced from the bond of her alleged first marriage to Tom Hendrix, and do that, upon such a finding being made by you, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, would have to satisfy you from facts or circumstances offered in evidence that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County rendered the alleged decree of divorce in a suit therein pending between Lillie Shaver Hendrix or Lillie Esther Hendrix and Thomas George Hendrix, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams had her domicile in the State of Nevada."

Assignment of Error No. 34 (R. p. 60):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters U to V, which is as follows:

"therefore, the State is not required to prove beyond a reasonable doubt from the testimony that a person enter-

ing into an alleged first marriage had the capacity to contract such marriage."

Assignment of Error No. 35 (R. p. 63):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters W to X, which is as follows:

"Now, the Court has told you that the defendants are charged with what is known in law as bigamous cohabitation, and during the course of its charge, the court has used [fol. 99] and will use the word cohabitation because the status provides that one of the essential elements of bigamous cohabitation is that the accused must cohabit in the State of North Carolina with the person with whom he is alleged to have contracted a second marriage outside of North Carolina."

Assignment of Error No. 36 (R. p. 69):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters Y to Z, which is as follows:

"and that on one or more occasions one of the defendants stated in the presence of the other that they were married to each other, and that on one occasion the feme defendant stated that she was now Mrs. Williams."

Assignment of Error No. 37, (R. p. 73):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters AA to BB, which is as follows:

"but such recitation does not compel you to make such an inference, for you may find from the evidence that notwithstanding such recitation, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, was not in fact or in truth domiciled in Nevada. The same rule applies to the recitations in the record of the proceedings instituted in Nevada by the defendant, O. B. Williams, and the court here charges you that the recitation in such record to the effect that the defendant, O. B. Williams was and was found to be a bona fide resident of Nevada for more than six weeks immediately preceding the institution of his ac-

tion for divorce constitutes prima facie evidence that the defendant, O. B. Williams, was a bona fide resident of Nevada domiciled in Nevada at the times recited. By this it is meant that such recitation is sufficient of itself to warrant your finding that the defendant, O. B. Williams, was a bona fide resident of Nevada domiciled in Nevada at the times recited in such recitation, but such recitation does not compel you to make such finding, for you may find that [fol. 100] notwithstanding such recitation the defendant, O. B. Williams, was not in fact domiciled in the State of Nevada."

Assignment of Error No. 38 (R. p. 74):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters CC to DD, which is as follows:"

"and that Caldwell County, North Carolina, was the domicile of O. B. Williams and Mrs. O. B. Wike Williams."

Assignment of Error No. 39 (R. p. 74):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters EE to FF, which is as follows:

"The State contends that you ought to find that the two defendants left their fixed homes in Caldwell County, North Carolina, and went to Nevada simply and solely for the purpose of securing divorces in Nevada and with the purpose at all times of returning to North Carolina as soon as they obtained such divorces."

Assignment of Error No. 40 (R. p. 74):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters GG and HH, which is as follows:

"but never in the State of Nevada insofar as the evidence discloses."

Assignment of Error No. 41 (R. p. 76):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters II to JJ (R. p. 76), which is as follows:

"The State contends that it has shown you as to each defendant beyond a reasonable doubt the four essential elements necessary to make out a prima facie case as against each of the defendants and insists that you cannot be satisfied that at the time of their marriage to each other in Nevada that the defendants or either of them had been lawfully divorced from their respective spouses by their [fol. 101] former marriages. The State contends that the defendants were domiciled in North Carolina and went to Nevada merely for the purposes of securing divorces and that they intended at all times to return to North Carolina as soon as they obtained such divorces and that they did return to North Carolina pursuant to their intentions as soon as they obtained divorce decrees."

Assignment of Error No. 42 (R. p. 82):

The defendants and each of them, assign as error that portion of the court's charge embraced within the letters KK to LL, which is as follows:

"The Court instructs you that if you should be satisfied from the evidence beyond a reasonable doubt that each and every one of the following four elements existed with respect to the defendant, O. B. Williams, namely:

1. That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Williams, a woman, before the times named in the bill of indictment;

2. That after the marriage between the defendant, O. B. Williams and Mrs. O. B. Wike Williams, namely on the 4th day of October, 1940 the defendant, O. B. Williams, contracted a marriage with the defendant, Lillie Shaver Hendrix, a woman, in the State of Nevada;

3. That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, Mrs. O. B. Wike Williams, his wife by a former marriage, was still living;

4. That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams, and his co-defendant, Lillie

Shaver Hendrix or Lillie Shaver Williams, cohabited to-
[fol. 102] gether in the State of North Carolina, then you will return a verdict finding the defendant, O. B. Williams, guilty of bigamous cohabitation, as charged in the bill of indictment, unless the defendant, O. B. Williams, satisfies you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County granted a decree of divorce in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada."

Assignment of Error No. 43 (R. p. 83).

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters MM to NN, which is as follows:

"If the State should satisfy you beyond a reasonable doubt from the evidence in the case that all four of the essential elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant, O. B. Williams, and if the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in the evidence that at the time the Eighth Judicial District Court in the State of Nevada rendered the decree of divorce in his favor in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams.

If the State should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of the four essential elements enumerated by the Court as necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant, O. B. Williams, and if the defendant, O. B. Williams, has satisfied you from the facts and circumstances offered in evidence, either by the State or by himself or by his co-
[fol. 103] defendant, that at the time the Eighth Judicial District Court in the State of Nevada in and for Clark County rendered a decree of divorce in his favor and against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada, then you would return a verdict of not guilty as to the defendant, O. B. Williams."

Assignment of Error No. 44 (R. p. 84):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters OO to PP, which is as follows:

"The Court instructs you, however, that if the State has satisfied you from the evidence in the case beyond a reasonable doubt that these four essential elements existed as to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, namely:

1. That the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, was lawfully married to Tom Hendrix, a man, before the times named in the bill of indictment;

2. That after the marriage between the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and Tom Hendrix, namely on or about the 4th day of October 1940, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contracted a marriage with her co-defendant, O. B. Williams, in the State of Nevada;

3. That at the time the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contracted a marriage with her co-defendant, O. B. Williams, in the State of Nevada, Tom Hendrix, her husband by a former marriage, was still living;

4. That after the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted the alleged marriage with her co-defendant, O. B. Williams, in the State of Nevada, the defendant, Lillie Shaver Hendrix or Lillie [fol. 104] Shaver Williams, and her co-defendant, O. B. Williams, cohabited together in the State of North Carolina,

—then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty as charged in the bill of indictment, unless the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams satisfies you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfies you from facts or circumstances offered in evidence, either by the State or by herself or by her co-defendant, that at the time the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada, rendered the decree of divorce in

her favor in her suit against Tom Hendrix or Thomas George Hendrix, that she was domiciled in the State of Nevada."

Assignment of Error No. 45 (R. p. 85):

The defendants, and each of them, assign as error that portion of the court's charge embraced within the letters QQ and RR, which is as follows:

"The Court instructs you that if the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, existed as to such defendant, and if the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, has failed to satisfy you from facts or circumstances in evidence that she was domiciled in the State of Nevada at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty as charged in the bill of indictment."

Assignment of Error No. 46 (R. p. 85):

The defendants, and each of them, assign as error that [fol. 105] portion of the court's charge embraced within the letters SS to TT, which is as follows:

"If the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and if the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, has satisfied you from facts or circumstances in evidence that she was domiciled in the State of Nevada at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict find-

ing the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, not guilty."

AGREEMENT OF COUNSEL

It is hereby stipulated and agreed that the foregoing and annexed pages constitute the case on appeal to the Supreme Court of North Carolina in that certain action entitled State v. O. B. Williams and Lillie Shaver Hendrix.

This 9th day of February, 1944.

W. H. Strickland, Attorney for Defendants. L. S. Spurling, Solicitor 16th Judicial District.

(Appeal Bond in the sum of $150.00 filed.)

(Transcript Certified by Clerk Superior Court.)

[fol. 106] SUPREME COURT OF NORTH CAROLINA—SPRING TERM, 1944

No. 291

STATE

v.

O. B. WILLIAMS and LILLIE SHAVER HENDRIX

Appeal by defendants from Ervin, Special Judge, November Term, 1943, of Caldwell.

Criminal prosecution tried upon indictment charging the defendants with bigamous cohabitation in violation of G. S. 14-183 (C. S. 4342).

The controlling facts as disclosed by the record are:

1. That the male defendant was married to Carrie Ora Wyke in 1916; that they lived together in Caldwell County, this State, as husband and wife for more than 23 years and reared a family of four children; that they have not lived together since the male defendant deserted his home on 7 May, 1940; that Carrie Ora Wyke Williams had brought no divorce proceedings against her husband at the time of the first trial of this cause in the Spring of 1941, at which time she testified in the case, and that she is now dead.

2. That the *feme* defendant was married to Tom Hendrix in 1920; that they lived together in this State as husband and wife for more than 19 years; that no children were born of this marriage; that they have not lived together since the *feme* defendant deserted her home on 7 May, 1940; that Tom Hendrix had brought no divorce proceeding against the *feme* defendant prior to the first trial of this cause, at which time he testified in the case, but that he has since and remarried.

3. That Tom Hendrix was working in the store of the male defendant at the time the defendants herein left the State; that the first knowledge he had of his wife's departure was "when he went home at night she was gone".

4. That both of the defendants appeared at the Alamo Court, Las Vegas, Nevada, on 15 May, 1940.

5. That the male defendant instituted action for divorce in Clark County, Nevada, on 26 June, 1940, charging his wife with "extreme cruelty towards this plaintiff". Service of summons was obtained by publication, and no appearance was made by the defendant, Carrie Ora Williams, albeit notice was served on her by the sheriff of Caldwell County, North Carolina. A decree of absolute divorce was granted by the Nevada Court on 26 August, 1940, for cause set out in the complaint. I. S. Thompson appeared as counsel for plaintiff in the action.

[fol. 107]. 6. That the *feme* defendant instituted action for divorce in Clark County, Nevada, on 26 June, 1940, alleging failure to support and "extreme mental cruelty" on the part of her husband. Service of summons was obtained by publication, and no appearance was made by the defendant, Tom Hendrix, though he sent plaintiff's counsel a post card saying that upon receipt of original appearance he would sign it. This he never did. O. B. Williams testified for the plaintiff in the case. He said the plaintiff had been living at the Alamo Court, Las Vegas, since 15 May, 1940, and that he had seen her every day while there. The plaintiff testified that she arrived in Clark County, Nevada, on 15 May, 1940, with intention of establishing an indefinite permanent residence. A decree of absolute divorce was granted by the Nevada Court on 4 October, 1940, for causes set out in the complaint. I. S. Thompson appeared as counsel for plaintiff in the action.

7. That the defendants were married in the State of Nevada on 4 October, 1940, and shortly thereafter in the fall of 1940, returned to North Carolina and are now living together at Pineola, Avery County, N. C. A true bill was returned against them at the February Term, 1941, Caldwell Superior Court.

8. The case was tried at the February-March Term, 1941, Caldwell Superior Court, which resulted in verdict and judgments against the defendants, and these were upheld on appeal. 220 N. C. 445, 17 S. E. (2d) 769. The judgment of affirmance was reversed on *certiorari* to the Supreme Court of the United States, and the cause remanded for proceedings not inconsistent with the opinion filed therein. 317 U. S. 287, 87 L. ed. 279. The case was thereupon remanded for a new trial in accordance with the opinion of

the Supreme Court of the United States, 222 N. C. 609, 24 S. E. (2d) 256.

When the matter was again called for trial at the November Term, 1943, Caldwell Superior Court, the defendants entered a plea of former jeopardy, and moved to dismiss on the ground that the judgment of affirmance had been "reversed" by the Supreme Court of the United States, and, therefore, the defendants were entitled to be discharged. Overruled; exception.

Verdict: Guilty as charged in the bill of indictment.

Judgments: Imprisonment in the State's Prison as to male defendant for not less than one nor more than three [fol. 108] years, as to *feme* defendant for not less than 8 nor more than 24 months.

The defendants appeal, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for the State.

W. H. Strickland for defendant.

Stacy, C. J. This is the same case that was before us at the Fall Term, 1941, reported in 220 N. C. 445, 17 S. E. (2d) 769, with ample reference to pertinent statutes and full statement of the facts, to which reference may be had to avoid repetition.

The short and simple facts upon which the case was made to turn in the court below are these: For many years the defendants lived with their respective spouses in the village of Granite Falls, Caldwell County, this State. The *feme* defendant's husband worked in the store of the male defendant. The defendants disappeared from their respective homes on 7 May, 1940. Eight days thereafter they both appeared at the Alamo Court, Las Vegas, Nevada. Exactly six weeks later each filed suit for divorce in Clark County, Nevada, on grounds recognized in that State, but not in this State. No appearance was made by the nonresident defendant spouse in either case. Service was by publication. Both defendants employed the same attorney. The uncontested divorces were granted on 26 August and 4 October, 1940, respectively. On the day of the last divorce, the defendants were married in the State of Nevada, and almost immediately thereafter they returned to North Carolina and have since lived together in this State. In all, they were out of

the State about six months. The defendants were convicted of bigamous cohabitation at the February-March Term, 1941, Caldwell Superior Court, and judgments pronounced. The judgments were affirmed on appeal, and later reversed by the Supreme Court of the United States and the cause remanded for proceedings not inconsistent therewith.

Our former decision was predicated primarily upon the ground that the Nevada divorce decrees, here in question, were not entitled to full faith and credit in this jurisdiction, because they were obtained on constructive service and no appearance had been made in the divorce proceedings by the non-resident defendants named therein. For this position we relied upon the celebrated case of Haddock v. Haddock, 201 U. S. 562, and a number of our own decisions accordant [fol. 109] therewith. Tyson v. Tyson, 219 N. C. 617, 14 S. E. (2d) 673; Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591; S. v. Herron, 175 N. C. 754, 94 S. E. 698. Aside from this, however, but secondarily, it was suggested that the evidence tended to show the defendants were not *bona fide* residents of the State of Nevada, and that they had fraudulently obtained their divorces in that State.

When the matter reached the Supreme Court of the United States on *certiorari* the Haddock case was overruled. This removed the principal ground upon which our decision had been made to rest. The logical result, therefore, was a reversal of the judgment of affirmance. Williams and Hendrix v. North Carolina, 317 U. S. 287, 87 L. ed. 279, 143 L. R. A. 1273. Not finding it appropriate to do so, the court of last resort did not pass upon the further challenge to the divorce decrees, towit, that the plaintiff in each case had acquired no actual, *bona fide* domicil in Nevada, and the proceeding was a sham and a fraud.

The contention is advanced that as the Supreme Court of the United States ground its decison on the assumption the defendants had acquired *bona fide* domicils in the State of Nevada (the only occasion for overruling Haddock v. Haddock) based in part at least on concession of evidence to support such a finding, the assumption must continue throughout all subsequent proceedings, and that so far as the present prosecution is concerned, no further inquiry into the matter is permissible. The argument is that originally the prosecution assumed it might assail the Nevada divorce decrees on one or two grounds; first, want of domicil in the divorce forum, Bell v. Bell, 181 U. S. 175, 45 L. ed.

804; and, secondly, want of effective service of process if domicil were established, Haddock v. Haddock, *supra*. Either showing, it was thought, would suffice to defeat the jurisdiction of the Nevada court. So, without contesting the question of domicil, the prosecution elected to stake its case in the Supreme Court on the second view, and lost. Consequently, it ought not to be permitted to go back now and challenge the defense on the first ground alone. Potts v. Ins. Co., 206 N. C. 257, 174 S. E. 123. This would be taking "two bites at the cherry". Dependents of Thompson v. Funeral Home, 205 N. C. 801, 172 S. E. 500. In short, the contention is that the assumption of domicil being necessary to reach the second view—the chosen battle-ground of the State—the fact of domicil is *res judicata*, and binding on the prosecution.

[fol. 110] The conclusion is a *non sequitur*. Even if the jury had found the defendants were domiciled in Nevada, still under the doctrine of Haddock, the divorce decrees, since they were entered on constructive service, might have been, and in fact for this very reason were, held for naught in North Carolina. This, and this alone, is what the court of last resort overruled and "reversed". The record did not disclose a finding by the jury that the defendants had actually acquired *bona fide* domicils in Nevada. Indeed, they may have found just the reverse. The verdict was a general one and there was evidence to support the State's challenge to the defense on the single ground of defective process or on the dual ground of no *bona fide* domicil and no valid process, albeit the record indicated the latter as the basic cause for sustaining the challenge. The indefiniteness of the record in this respect, however, coupled with an admission which the State regarded as immaterial under the *Haddock* Case, induced the reversal of the judgment of affirmance. In other words, the legal theory upon which the State chiefly relied to defeat the defense set up by the defendants was disapproved. This did not perforce preclude further challenge to the defense on other grounds. It eliminated the second premise, but it did not work an acquittal of the defendants. An error in respect of the defense set up in a criminal action would not dispose of the indictment. Moreover, the concession was made in the appellate court. Had such admission been made by the solicitor in the trial court and acted upon by the jury, a different situation might have arisen. But that is another

matter. 20 Am. Jur. 469. See S. v. Butler, 151 N. C. 672, 65 S. E. 993, 25 L. R. A. (N. S.) 169, 19 Ann. Cas. 402. To sustain the conviction and the judgment upholding it, the State was compelled to rely on the principle of the Haddock decision because it was the main theory of the trial. The issue was squarely joined.

The effect of the decision of the Supreme Court of the United States in this case is to preserve the sufficiency and effectiveness of constructive service of process in actions for divorce in proper cases of domicil. The pronouncement is that full faith and credit to such proceedings may no longer be denied in other states of the Union upon this ground alone. Speaking directly to the point, the majority opinion says: "So when a court of one state acting in accord with the requirements of procedural due process [fol. 111] alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause because its enforcement or recognition in another state would conflict with the policy of the latter".

The issue of domicil was expressly left open, as witness the following from the opinion: "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada." And further: "If the case had been tried and submitted on that issue (domicil) only, we would have quite a different problem, as Bell v. Bell indicates. We have no occasion to meet that issue now and we intimate no opinion on it. However it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that the petitioners' domicil in Nevada was a sham and a fraud."

Following this last suggestion and faced with the appraisal that the case had been tried in the main upon an unsound principle of law, we remanded it for another hearing or a new trial, as is the rule in this jurisdiction. 222 N. C. 609, 24 S. E. (2d) 256. Where a case is tried under a mis- [fol. 112] apprehension of the law, the practice is to remand it for another hearing. S. v. Calcutt, 219 N. C. 543, 15 S. E. (2d) 9; McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324. This then became the law of the case. "A decision by the Supreme Court on a prior appeal constitutes the law of the

case, both in subsequent proceedings in the trial court and on a subsequent appeal." Harrington v. Rawls (6th syllabus), 136 N. C. 65, 48 S. E. 57. See Robinson v. McAlhaney, 216 N. C. 674, 6 S. E. (2d) 517, and cases there cited. It results, therefore, that the plea of former jeopardy and motion to dismiss were properly overruled. S. v. Rhodes, 112 N. C. 857, 17 S. E. 164; United States v. Ball, 163 U. S. 662.

We now come to the exceptions noted during the trial after the special pleas had been overruled.

The defendants are charged with bigamous cohabitation in violation of G. S. 14-183 (C. S. 4342), the pertinent provisions of which follow: "If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

Upon the issues raised by the pleas of traverse, the prosecution offered evidence tending to show that each of the defendants had been previously married; that their respective spouses were still living at the time of the first trial; that the defendants had undertaken to contract a marriage in the State of Nevada, and that thereafter they had cohabited with each other in this State. This made out a *prima facie* case, sufficient to carry the issue to the jury, and hence the demurrer to the evidence was properly overruled. S. v. Herron, 175 N. C. 754, 94 S. E. 698.

It will be observed that the statute does not apply to persons who have been "lawfully divorced" from the bond of the first marriage at the time of the second marriage. Such persons are exempt from the operation of the statute, and properly so. Hence a lawful divorce from the bond of the first marriage at the time of the second marriage would be a defense to the prosecution.

The defendants set up in defense their respective divorces obtained in the State of Nevada. The court in- [fol. 113] structed the jury that the record of these divorces, offered by the defendants, constituted *prima facie* evidence of their lawfulness and binding effect, not only in the State of Nevada, but also in the State of North Caro-

lina and every other state. Loughran v. Loughran, 292 U. S. 216, 78 L. ed. 1219.

In reply the prosecution contended that neither of the defendants had acquired an actual, *bona fide* domicil in the State of Nevada at the time of the institution of the divorce actions, and that the proceedings, while apparently regular, were in fact void for want of jurisdiction. Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366.

In this connection the court instructed the jury as follows:

1. "If a person had a domicile in North Carolina, and such person leaves North Carolina and goes to the State of Nevada simply and solely for the purpose of obtaining a divorce in the State of Nevada, and with the intention of returning to the State of North Carolina when such divorce is obtained, such person never loses his domicile in North Carolina, and never acquires a new domicile in the State of Nevada."

2. "If a court in a suit in the State of Nevada should grant a divorce to a plaintiff who is not domiciled in Nevada, against a non-resident spouse who is not domiciled in the State of Nevada, and who is not personally served with summons in Nevada, and who does not enter a general appearance in the suit in the court in Nevada, then the divorce granted by the court in Nevada in such instance is void, and is not entitled to full faith and credit in the State in which the non-resident spouse has his or her domicile."

If these pronouncements be sound, the exceptions taken on the trial are without substantial merit and cannot be sustained.

The first instruction would seem to be in accord with the decisions on the subject. Leaving one's domicil of origin and going into another state simply and solely for the purpose of obtaining a divorce, with a mind of immediately returning, is not sufficient to effect a change of domicil. McKarthy v. McKarthy, 39 N. Y. S. (2d) 922; Commonwealth v. Esenwein, 35 A. (2d) 335; Commonwealth v. Kendall, 162 Mass. 221, 38 N. E. 504; 106 A L R 6, et seq. The *animus manendi* would be lacking, Williamson v. Osenton, 232 U. S. 619; 106 A L R 14.

[fol. 114] Domicil is a matter of fact and intention. In Re Martin, 185 N. C. 472, 117 S. E. 561; 17 Am. Jur. 595. In ordinary acceptation, it is the place where one lives or has his home. Reynolds v. Cotton Mills, 177 N. C. 412, 99 S. E. 240. Two circumstances must concur in order to establish a domicil: first, residence, and secondly, the intention to make it a home, or to live there permanently, or, as some of the cases put it, indefinitely. Horne v. Horne, 31 N. C. 104; Thayer v. Thayer, 187 N. C. 573, 122 S. E. 307. To effect a change of domicil, therefore, the first domicil must be abandoned with no intention of returning to it, and actual residence taken up in another place coupled with the intention to remain there permanently, or indefinitely. Roanoke Rapids v. Patterson, 184 N. C. 135, 113 S. E. 603; Annotation, 148 A L R 1413.

On the other hand, the jury was instructed that if the defendants went to Nevada with the requisite intent and actually acquired a domicil there, though they later changed their minds and returned to this State, the courts of that State acquired jurisdiction of the marital status of the defendants and the decrees in evidence would be entitled to full faith and credit in this State and every other state. Davis v. Davis, 305 U. S. 32, 83 L. ed. 26; 118 A L R 1518; Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794. The court further instructed the jury that since the defendants had set up these foreign judgments as a defense and the prosecution had challenged them, the practice in this jurisdiction was to require the defendants to show to the satisfaction of the jury that they had acquired *bona fide* domicils in the foreign state at the time of the institution of the divorce proceedings. S. v. Melton, 120 N. C. 591, 26 S. E. 933. In other words, having pleaded lawful divorces in defense, the burden was on the defendants to satisfy the jury of their lawfulness. S. v. Herron, *supra*; S. v. Norman, 13 N. C. 222. And while the decrees, standing alone, were to be taken as *prima facie* valid, nevertheless they were not conclusive. Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. ed. 807; Thompson v. Whitman, 85 U. S. 457. At the threshold of the case, however, and throughout the hearing, the prosecution was required to establish the guilt of the accused beyond a reasonable doubt. S. v. Harris, 223 N. C. 697. Under these instructions, the jury has resolved the issue against the defendants, and the evidence is amply sufficient to support the verdict. Indeed, it was

said on the former hearing, "the evidence indicates collu-
[fol. 115] sion between the defendants, and bad faith in attempting to secure decrees of divorce, contrary to the laws of this State."

Perhaps it should be noted that what is here said in respect of the "burden of satisfaction" has reference to a defense pleaded in a criminal action, the validity of which is challenged by the prosecution. S. v. Harris, *supra*. "When a divorce is set up as the sole defense to an indictment, as in this case, the invalidity of such defense is not a collateral matter, but a legitimate reply by the State directly impeaching the defense set up". S. v. Herron, *supra*. It should not be confused with the rules applicable in civil actions. 143 A L R 1307.

The second instruction above quoted is directly supported by what was said in Bell v. Bell, 181 U. S. 175, 45 L. ed. 804. "No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled". Jurisdiction of the court granting a divorce in one state may be impeached in another, and if it appear that neither party had acquired a *bona fide* domicil when and where the proceedings were instituted, notwithstanding recital of the jurisdictional fact and evidence supporting it, the decree annulling the marriage would be void and entitled to no protection under the full faith and credit clause of the Federal Constitution. In re Bingham's Will, 39 N. Y. S. (2d) 756; McKarthy v. McKarthy, *supra*; Commonwealth v. Esenwein, *supra*; Annotation 143 A L R 1294; 31 Am. Jur. 156. Nothing was said in Davis v. Davis, *supra*, which militates against this position. See annotation 118 A L R 1524.

In Andrews v. Andrews, *supra*, it was said that in divorce actions, domicil is the inherent element upon which jurisdiction must rest, whether the proceeding be *ex parte* or *inter partes*. Where one's domicil is, there will his marital status be also. The marriage relation is interwoven with public policy to such an extent that it is dissolvable only by the law of the domicil. So the domiciliary state, and no other, furnishes the proper forum for valid divorce proceedings. Domicil of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. 143 A L R 1298. A domicil once obtained is never lost until another is acquired. Reynolds v. Cotton Mills, *supra*.

[fol. 116] Here, the jury has found that the defendants were domiciled in this State when they brought their actions for divorce in Nevada; that they had acquired no *bona fide* domicil in that State, and that the Nevada decrees were ineffectual to sever the marriage ties. The result was a rejection of the pleas interposed by the defendants, and a conviction as charged in the bill of indictment. The record and the law applicable to the facts appearing thereon support the jury's findings. German Sav. & Loan Security v. Dormitzer, 192 U. S. 125, 48 L. ed. 373.

It was held in Thompson v. Whitman, 85 U. S. 457, that the full faith and credit clause did not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; that the record of a judgment rendered in another state might be contradicted as to the facts necessary to give the court jurisdiction, and, that if it should appear such facts did not exist, the record would be a nullity, notwithstanding a recital in the judgment that such facts did exist. See Lefferts v. Lefferts, 263 N. Y. 131, 188 N. E. 279, and Foster v. Foster, 46 N. Y. S. (2d) 320.

There remains to be considered the constitutionality of the statute under which the defendants have been indicted and convicted. It is challenged upon the ground that it offends both the Federal and State Constitutions. This was the subject of investigation in the case of S. v. Moon, 178 N. C. 715, 100 S. E. 614. The constitutionality of the enactment was there upheld. It would only be repetitious to reiterate here what was said there. Nor is the fact that the bigamous cohabitation took place in Avery County, and not in Caldwell, fatal to the prosecution. S. v. Moon, *supra*. The defendants originally lived in Caldwell County and were apprehended there. The venue is prescribed by the statute: "Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county."

From a legal standpoint, it all comes to this: On the first appeal the State relied on the case of Haddock v. Haddock. We were minded to follow that case. It was overruled by the Supreme Court of the United States. The State now relies on the case of Bell v. Bell. We are disposed to follow this case.

A careful perusal of the record leaves us with the impression that the case has been tried in accordance with the pertinent decisions on the subject, and that it is free from reversible error. Hence, the verdict and judgments must be upheld.

No Error.

A true copy Adrian J. Newton, Clerk of the Supreme Court of North Carolina. (Seal.)

[fol. 117] IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE

v.

O. B. WILLIAMS and LILLIE SHAVER HENDRIX

Appeal docketed 10 February, 1944.
Case argued 21 March, 1944.
Opinion filed 12 April, 1944.
Final Judgment entered 12 April, 1944.

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petition to rehear in criminal actions and that the opinion of this Court filed April 12, 1944, hereto attached, is the final decision of the Supreme Court of North Carolina, the Court of last resort in said State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 13 April, 1944.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina. (Seal)

[fol. 118] [Endorsed:] No. 291 Monday Apr. 3, 1944. State v. Williams. Stacy, C. J. No. Error Sch. Filed Apr. 12, 1944, in the Office of Clerk Supreme Court, of North Carolina. Caldwell.

[fol. 118] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 84

ORDER ALLOWING CERTIORARI—Filed June 12, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is assigned for argument immediately following No. 668, Esenwein vs. Commonwealth ex rel. Esenwein.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48,492. North Carolina Supreme Court. Term No. 84. O. B. Williams and Lillie Shaver Hendrix, Petitioners, vs. The State of North Carolina. Petition for a writ of certiorari and exhibit thereto. Filed May 13, 1944. Term No. 84 O. T. 1944.

(3251)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 999 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

W. H. STRICKLAND,
Counsel for Petitioners.

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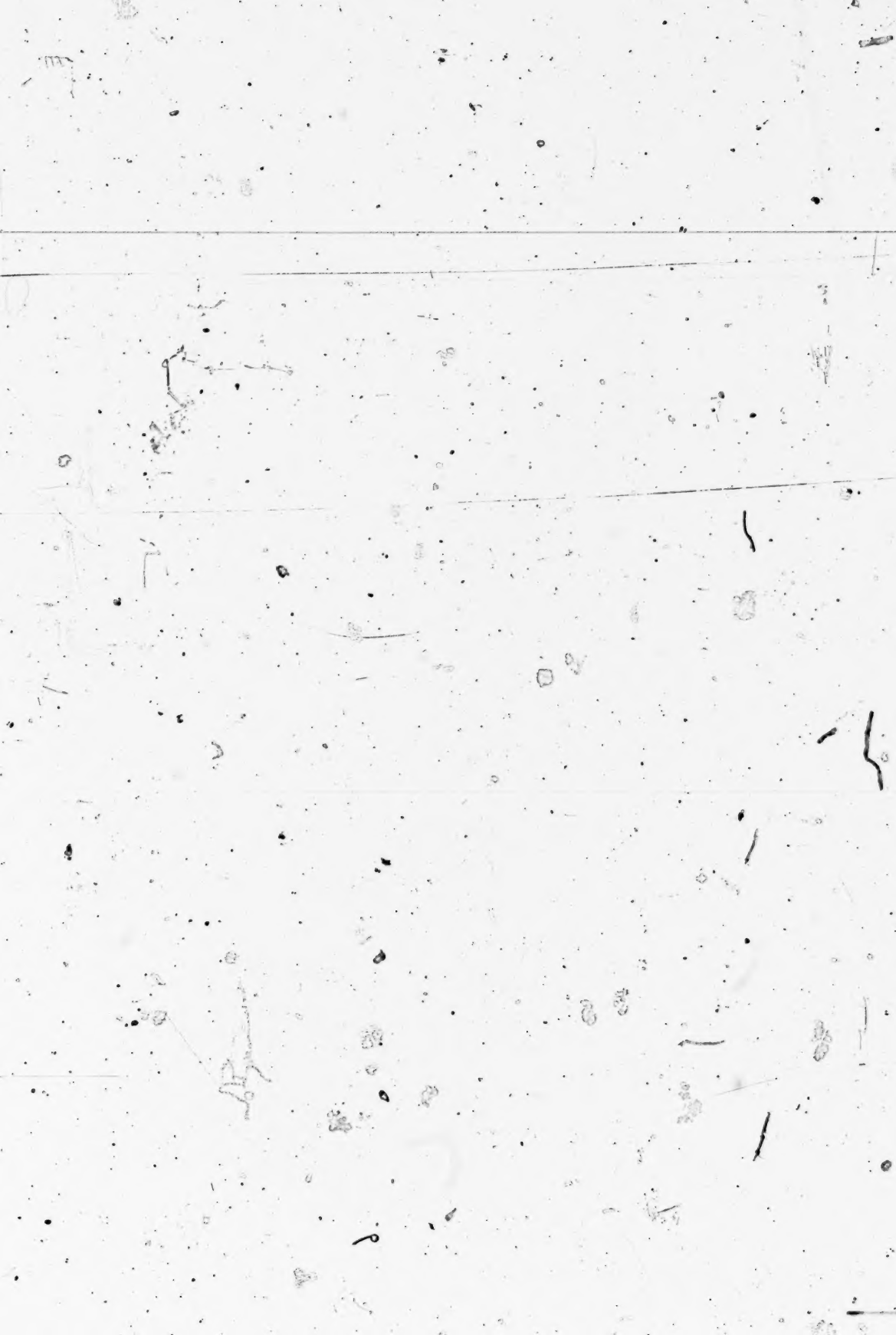

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 999

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

Summary

Your petitioners, O. B. Williams and Lillie Shaver Hendrix, (the names under which your petitioners were indicted) petition this Honorable Court for a writ of certiorari to issue to the Supreme Court of North Carolina, and would respectfully show:

That your petitioners were indicted in the Superior Court of Caldwell County, North Carolina, under a bill of indictment as appears in the record (R. 3) charging the crime of bigamous cohabitation; that your petitioners were citizens and residents of the State of Nevada and had been so adjudged by certain decrees of a Court of competent

jurisdiction in said State of Nevada (R. 22 and 35). That upon adjudication that the bona fide residence of your petitioners was in the State of Nevada, your petitioners procured a judgment of absolute divorce from their respective spouses (R. 22 and 35) in a court of competent jurisdiction in the State of Nevada, your petitioner, O. B. Williams procuring service of summons and complaint under and by virtue of the statute in the State of Nevada providing for service of process in a foreign state in actions *in rem* or *quasi in rem* by the sheriff of the county and state of the residence of the defendant; the former spouse of Lillie Shaver Hendrix having signed a card (R. 48) agreeing to accept service of process when the same was forwarded to him and he having fled to the State of Ohio, actual service was had upon him by publication. Upon rendition of a decree of absolute divorce, which decree restored the petitioners to the status of single persons in the State of Nevada, your petitioners intermarried with each other in the State of Nevada and in full accordance with the laws of the State of Nevada and subsequently thereto came to the State of North Carolina when and where they were indicted for bigamous cohabitation. That your petitioners were first tried in the Superior Court of Caldwell County at the February Term, 1941, and upon a verdict of guilty by the jury, were given prison terms as appear of record. That your petitioners appealed to the Supreme Court of North Carolina, which Court upheld the convictions (220 N. C. 445). The United States Supreme Court allowed petition for writ of certiorari and upon hearing of said cause reversed the opinion of the Supreme Court of North Carolina (87 L. Ed. 279). The Supreme Court of North Carolina subsequent to the decision by this Honorable Court ordered a new trial of your petitioners in the Superior Court of Caldwell County, North Carolina, that the Supreme Court

of North Carolina refused to recognize the opinion of the United States Supreme Court and in addition thereto failed and refused to assign any error either in its own opinion or the opinion of the United States Supreme Court (220 N. C. 609) but simply ordered a new trial.

That your petitioners when said cause was again called for trial in the Superior Court of Caldwell County, North Carolina, entered a plea of former jeopardy which plea was overruled and your petitioners reserved exceptions. That your petitioners were again convicted of the alleged crime of bigamous cohabitation and again appealed to the Supreme Court of North Carolina. That the Supreme Court of North Carolina on April 12, 1944 filed an opinion affirming the conviction of your petitioners, which opinion is contrary to the opinion of the United States Supreme Court in this identical case as appears in 87 L. Ed. 279.

That your petitioners in the trial court relied upon the following Federal questions:

1. That the Courts of North Carolina when Federal questions are involved, are bound by the decisions of the United States Supreme Court which decision in this identical case as reported in 87 L. Ed. 279, the North Carolina Supreme Court entirely disregarded.

2. That your petitioners further relied upon the plea of former jeopardy, there having been no error assigned either by the United States Supreme Court or the North Carolina Supreme Court, your petitioners relying upon the provisions of Amendment V to the United States Constitution.

3. Your petitioners further relied upon the provisions of Amendment XIV to the United States Constitution to the effect that the statute under which your petitioners are indicted is unconstitutional by reason of said Amendment

XIV, for the reason that the statute exempts persons who have been lawfully divorced from their former spouses and under the interpretation placed thereon by the Supreme Court of North Carolina that tribunal attempts to say whether divorce decrees rendered by the State of Nevada are illegal and void or whether such decrees are valid.

4. The defendants further relied upon the full faith and credit clause of the United States Constitution to-wit; Article 4, Section 1 providing "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may enact general laws prescribing the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Jurisdiction

This Court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves the following distinct Federal questions.

1. The defendants having been heretofore tried and convicted by a jury in the Superior Court of Caldwell County and that conviction having been affirmed by the Supreme Court of North Carolina and on petition for writ of certiorari to the United States Supreme Court the judgment of the North Carolina Supreme Court having been reversed and no new trial ordered, the defendants' plea of former jeopardy as appears of record is available to them.

2. The North Carolina Supreme Court is bound by the decisions of the United States Supreme Court when Federal questions are involved.

3. That the State of North Carolina is required under and by virtue of Article 4, Section 1 of the United States Constitution to give the same faith and credit to the divorce

decrees regular on their face and the marriage of the defendants as is accorded to said decrees and marriage in the state of their rendition, to-wit; the State of Nevada.

4. That under Article 4, Section 2 of the United States Constitution providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states these defendants, having been heretofore duly adjudged bona fide citizens of the State of Nevada, that the Courts of North Carolina cannot in view of the provisions of the United States Constitution above set forth decree what shall be a lawful or unlawful divorce and marriage in a foreign state, the State of North Carolina having offered no evidence challenging or impeaching the adjudication of the question of fact as to the bona fide residence of the defendants in the State of Nevada upon the grounds of fraud or lack of jurisdiction or any other grounds.

5. Your petitioners having been legally divorced pursuant to the laws of the state of their residence or domicile and having intermarried with each other pursuant to the laws of said state, cannot by virtue of the provisions of Amendment XIV to the Constitution of the United States be convicted for bigamy or bigamous cohabitation upon moving from the state of their domicile or residence into North Carolina or any other state.

The foregoing constitutional questions were duly presented to the Supreme Court of North Carolina by both the record exceptions and the brief of your petitioners but that the Supreme Court of North Carolina held that it was not bound under the full faith and credit clause to give full faith and credit to the Nevada divorce decrees. The Supreme Court of North Carolina further held that it had the right, even in the absence of evidence, to infer that the Nevada divorce decrees were a sham and a fraud. The

Supreme Court of North Carolina further held that Section 4342 of the North Carolina Code was not in violation of Amendment XIV to the United States Constitution. The Supreme Court of North Carolina further held that your petitioners' plea of former jeopardy under Amendment V of the United States Constitution was not available to them.

That the other questions raised in the brief by your petitioners in the North Carolina Supreme Court were not passed upon.

That your petitioners further show the Court that it is not possible for them to file a petition to re-hear said cause in the Supreme Court of North Carolina and that the opinion of the Supreme Court of North Carolina, as appears of record is the final judgment therein.

That your petitioners believe that the decision of the Supreme Court of North Carolina upholding the conviction of your petitioners for the alleged crime of bigamous cohabitation is contrary to the opinion of this Honorable Court in the identical case of *O. B. Williams, et al.* v. *The State of North Carolina* as reported in 87 L. Ed. 279.

Wherefore it is respectfully prayed that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment and opinion of the Supreme Court of North Carolina; and your petitioners will ever pray.

W. H. Strickland,
Attorney for Petitioners,
Lenoir, North Carolina.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Supreme Court of North Carolina sought to be reviewed, is reported in 224 North Carolina, Page 183, and appears in the record filed herein beginning on page 106 and continuing through page 117.

Jurisdiction.

1. Your petitioners further contend that in the former hearing of this cause by the United States Supreme Court that there was no error assigned and no new trial ordered, but that the Court reversed outright the opinion of the North Carolina Supreme Court and that the North Carolina Supreme Court attempted to "vacate" its judgment which had already been reversed by the United States Supreme Court and without the assignment of any error whatsoever ordered a new trial of this cause of action which constitutes former jeopardy, your petitioners relying upon the provisions of Amendments V to the United States Constitution.

2. Your petitioners contend that the State of North Carolina is bound, when Federal questions are involved, by the decisions of the United States Supreme Court. That the United States Supreme Court decided this identical case as reported in 87 L. Ed. page 279; and that this Court reversed the former decision of the North Carolina Supreme Court. That the North Carolina Supreme Court refused to follow the directions of the United States Supreme Court but, on the contrary, ordered a new trial of these petitioners which again resulted in a conviction upon the identical evidence that was produced by the State at the first trial and which evidence was before the United States Supreme Court in the first hearing, your petitioners relying upon Article 4, Section 1 of the United States Constitution and upon *Yerys* v. *New York Life Insurance Company*,

210 North Carolina, 442. The North Carolina Supreme Court held in the latter case that matters passed upon by the United States Supreme Court are res judicata.

"3. Your petitioners further relied upon Article 4, Section 1, of the Constitution of the United States providing that full faith and credit shall be accorded the judicial decrees of a sister state when those decrees have been rendered in accordance with the laws of the state where rendered. In *Williams et al. v. North Carolina*, 8[illegible] L. Ed. 279, this identical case was passed upon by the United States Supreme Court and it was there held that North Carolina must give full faith and credit to the Nevada divorce decrees involved in this controversy.

In *Davis v. Davis*, 83 L. Ed., the United States Supreme Court held:

> "'28 U. S. C. A., Sec. 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken. Thus Congress rightly interpreted the clause to mean not some but full credit . . . the acts extended the rule of the Constitution to all courts, Federal as well as State.'"

Likewise in *Loughran v. Loughran*, 78 L. Ed. 1219, it is held:

> "Marriages, not polygamous or incestuous or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction.
>
> "Courts of the District of Columbia are bound, equally with the courts of the states, to observe the command of the full faith and credit clause.
>
> "If a marriage is valid in the state in which it is contracted its validity will be recognized in another state

so as to entitle the woman to dower in the lands in the latter state although the marriage would not have been valid as contracted in such state."

In *Atherton* v. *Atherton*, 181 U. S. 155, this Court held:

"A decree of divorce based upon notice pursuant to state laws is entitled to faith and credit in the courts of another State."

In *Jansson* v. *Jansson*, 269 Ill. App. 233, it was held where a party to divorce proceedings in a sister state has brought suit upon constructive service and established a bona fide residence in such state and the suit is free from any fraud, the courts of Illinois will give full faith and credit to the decree of such other state.

In *Miller* v. *Miller*, 200 Iowa 1193, foreign divorce decrees are held to be entitled to full faith and credit.

In *McKisson* v. *McKisson*, 154 Sou. 618, the Louisiana courts held that the courts of one state cannot ignore divorce decrees rendered in another state.

In *Palmer* v. *Palmer*, 265 Mass. 242, it was held that non residents of the state who married outside of the state though violative of the restrictions of the state of the forum were entitled to have such marriages recognized in the state of the forum.

In *Hanna* v. *Hanna*, 224 Mo. App. 1142 (32 SW 2d. 125) it was held that a divorce decree rendered in another state *and not proven to have been obtained by fraud or collusion is entitled to recognition.*

Paby v. *Paby*, 107 NJEQ. 538 (153 Atlantic 519) it was held that where the court rendered the decree of divorce if it had jurisdiction of the subject matter its adjudication that the complainant or plaintiff in the divorce action was a bona fide resident was conclusive and final and binding upon all the courts.

4. Your petitioners further relied upon the provisions of Amendment XIV, Section 1, of the United States Constitution which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is conceded that your petitioners were duly divorced under the laws of the State of Nevada prior to their marriage in the State of Nevada. It is also conceded that your petitioners are first citizens of the United States. The courts in Nevada received evidence upon the good faith of your petitioners' residence in the State of Nevada and upon the finding of fact that your petitioners were bona fide residents, your petitioners contend that the State of North Carolina is bound thereby. Moreover the State of North Carolina offered no evidence challenging the jurisdiction of the Nevada courts or challenging the legality of the divorce decrees rendered by the State of Nevada nor did the State of North Carolina offer any evidence impeaching said judgments for fraud. The State of North Carolina contended itself by resting upon exactly the same evidence adduced in the first trial of this cause. Your petitioners therefore contend that to put the construction upon Section 4342 of the North Carolina Code, which the North Carolina Supreme Court has done, constitutes an unlawful extension of the legislative powers of the State of North Carolina. The pertinent provisions of Section 4342, among other things, provides that that statute shall not apply to persons who have been lawfully divorced. To sustain the conviction of your petitioners, the North Carolina Supreme Court has to, in effect, hold that the Nevada divorce decrees were and are unlawful. Your petitioners believe that the North Carolina Supreme Court cannot extend the legislative powers of the State of North Carolina to the State of Nevada and by its interpretation of the statute involved

say when a foreign divorce decree is legal or illegal. Your petitioners also relied upon Article 4, Section 2, of the United States Constitution.

In *Cole v. Cunningham*, 33 L. Ed. 538 it was held with respect to the privileges and immunities clause:

> "The intention of this clause was to confer on the citizens of the several states a general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions."

It is not contended by the State of North Carolina that your petitioners were not legally divorced and legally married under the laws of the State of Nevada, but they simply say that they are not required to recognize, by virtue of the full faith and credit clause, a Nevada divorce decree.

Social Importance of the Question Involved

To apply the interpretation to the statute involved and under which your petitioners were indicted which the North Carolina Supreme Court has applied would tend to freeze the citizenship within the boundary of each respective state. At the present time there are literally thousands of soldiers and defense workers located in North Carolina who have come from other states and without a doubt there are many among them who have been divorced and remarried in other states. Under North Carolina's interpretation of the statute, all of such persons who have been divorced and remarried in some other state and have removed to North Carolina for whatever purpose, either as a soldier or to a defense project, could be indicted, convicted and sentenced to prison for long periods of time. Obviously, such a statute denies to the citizens of the several states the privileges and immunities guaranteed by the United States Constitution. To uphold the opinion of the North Carolina Supreme

Court and create the intolerable situation of having people legally divorced and legally married in one state and living in bigamy in another state, would bastardize the children of the second marriage for literally thousands of people and create a situation where such children would be legitimate in one state and illegitimate in another and in still another their status would be unknown. In addition thereto it would upset property rights which have been vested in children of second marriages throughout the country.

It is now high time that the Supreme Court of the United States pass upon the constitutionality of the North Carolina statute under which these defendants are indicted to the end in view that if said statute be determined unconstitutional that there will be an end to the unjust persecution which your petitioners have endured.

The State of North Carolina in its second opinion relied upon *Bell* v. *Bell* 181 U. S. 175, 45 L. Ed. 804, in affirming a verdict of guilty on the second trial. *Bell* v. *Bell* has absolutely no application to the case at bar. In *Bell* v. *Bell* the suit was instituted by a New York resident in the State of Pennsylvania and when the decree of divorce rendered by the courts of Pennsylvania came under attack, the party attacking said decree was able to show by the defendant's own affidavit for the probate of a will in the State of New York a short time prior to the rendering of the decree of divorce in the State of Pennsylvania, that the defendant was at that time a citizen and resident of the State of New York. Obviously, when the party attacking a divorce decree has not become a citizen and resident of the state rendering the decree, and neither has the party procuring such decree and that is shown by defendant's own testimony in the form of an affidavit, the court was justified in finding as a fact that he was not a bona fide citizen and resident of the state attempting to dissolve the

bonds of matrimony. However, in the case at bar, the State of North Carolina, as has heretofore been said, offered no evidence showing the lack of residence or bona fide domicile in the State of Nevada which would impeach in any manner the decrees of the Nevada courts. In addition to this, *Bell* v. *Bell* involves a right of action *in personam* rather than a right of action *in rem*. There is a decided and distinct difference in the nature of the two separate actions.

The North Carolina Supreme Court failed to distinguish this difference and therefore based its present decision upon *Bell* v. *Bell* since *Haddock* v. *Haddock* was previously overruled by the United States Supreme Court.

Conclusion.

Symmetrically and logically stated the proposition is this:

The petitioners, in good faith, established their residence in Nevada in accordance with the laws of Nevada and in good faith and with notice to their former sponses, obtained legal divorce decrees in the State of Nevada. They, in good faith, intermarried in the State of Nevada after having met all the requirements of the laws of the State of Nevada.

Can the State of North Carolina successfully prosecute your petitioners a second time, in spite of their plea of former jeopardy, when they have been legally divorced and legally married in a sister state in view of the safeguards guaranteed citizens of the United States by the Constitution of the United States?

Respectfully submitted,

W. H. Strickland,
Lenoir, North Carolina.

BRIEF FOR THE PETITIONER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONERS

W. H. STRICKLAND,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,
vs.
THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONERS.

Syllabus of Brief.

Your petitioners having been once convicted in the Superior Court of Caldwell County and that conviction having been affirmed by the North Carolina Supreme Court and the opinion of that Court having been reversed by the Supreme Court of the United States, without the assignment of any errors, the petitioners' plea of former jeopardy is available. *Bull* v. *United States*, 41 L. Ed. 300; *Williams* v. *North Carolina*, 317 U. S. 287.

North Carolina is bound by the decisions of the United States Supreme Court when Federal questions are involved. *United States Constitution*, Article 4, Section 1; *Yerks* v. *New York Life Insurance Company*, 210 N. C. 442.

1*a*

Divorce decrees regular on their face cannot be collaterally attacked except for fraud. *Wade* v. *Dick*, 36 N. C. 313; *Eure* v. *Paxton*, 80 N. C. 17; *Duffer* v. *Brunson*, 188 N. C. 789; *Wood* v. *Sugg*, 91 N. C. 93; *Stocks* v. *Stocks*, 179 N. C. 285.

Facts once litigated by a court of competent jurisdiction cannot be again litigated in the courts of another state. *Magnolia Petroleum Company* v. *Hunt*, 88 L. Ed. 461; *Harding* v. *Harding* 49 L. Ed. 1066; 34 *Corpus Juris*, Page 1127, Section 1603.

Divorce action is an action *in rem*. *Garner* v. *Garner*, 56 Md. 127; *Page* v. *Baker*, 76 N. Y., 78; *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689; *Kendrick* v. *Kendrick*, 188 Mass. 550.

Action for divorce being one *in rem*, service by publication is valid; *Pennoyer* v. *Neff*, 95 U. S. 714; *Gassert* v. *Strong*, 38 Mont. 18; *Millikan* v. *Meyer*, 85 L. Ed. 278.

North Carolina, under the full faith and credit clause of the Constitution of the United States, is required to give full faith and credit to Nevada divorce decrees regular on their face. *Farris* v. *Hope*, 298 F. 727; *Frey* v. *Frey*, 58 F. 2d 1046; *Davis* v. *Davis*, 83 L. Ed. 26; *Loughran* v. *Loughran*, 292 U. S. 216; *Atherton* v. *Atherton*, 181 U. S. 155.

The petitioners having been adjudged bona fide citizens of the State of Nevada are entitled to all privileges and immunities granted by Article 4, Section 2 of the *United States Constitution; Connor* v. *Elliott*, 15 L. Ed. 497; *Cole* v. *Cunningham*, 33 Fed. 538.

Section 4342 (Appendix I) of the North Carolina Code is unconstitutional in that it attempts to invade the privileges and immunities of citizens of other states contrary to the constitution of the United States. Amendment XIV of the *Constitution of the United States; Connolly* v. *Union Sewer Pipe Company* 46 L. Ed. 679; *Ratcliff* v. *State of Texas*, 289 S. W. 1072.

Bell v. *Bell*, which the North Carolina Supreme Court relied on for its second opinion, has no application to the case at bar for the reason that the party procuring the divorce in that instant had never been a resident of the State of Pennsylvania.

The State of North Carolina having attacked the domicile of your petitioners in the State of Nevada it was incumbent upon the State to offer evidence supporting its attack. 28 C. J. S., Section 6, page 11; 28 C. J. S., Section 9, page 11; 28 C. J. S., Section 10, page 14; C. J. S., Section 11, page 17.

To uphold the opinion of the North Carolina Supreme Court would be to upset property rights and declare children born to a second union illegitimate and otherwise embarrass the children of such second unions. *Williams, et al* v. *North Carolina*, 87 L. Ed. 279.

Statement of Jurisdiction.

This Court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves the following distinct Federal questions.

1. The defendants having been heretofore tried and convicted by a jury in the Superior Court of Caldwell County and that conviction having been affirmed by the Supreme Court of North Carolina and on petition for writ of certiorari to the United States Supreme Court the judgment of the North Carolina Supreme Court having been reversed and no new trial ordered, the defendants' plea of former jeopardy as appears of record is available to them.

2. The North Carolina Supreme Court is bound by the decisions of the United States Supreme Court when Federal questions are involved.

3. That the State of North Carolina is required under and by virtue of Article 4, Section 1 of the United States Constitution to give the same faith and credit to the divorce

decrees regular on their face and the marriage of the defendants as is accorded to said decrees and marriage in the state of their rendition, to-wit; the State of Nevada.

4. That under Article 4, Section 2 of the United States Constitution providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states these defendants, having been heretofore duly adjudged bona fide citizens of the State of Nevada, that the Courts of North Carolina cannot in view of the provisions of the United States Constitution above set forth decree what shall be a lawful or unlawful divorce and marriage in a foreign state, the State of North Carolina having offered no evidence challenging or impeaching the adjudication of the question of fact as to the bona fide residence of the defendants in the State of Nevada upon the grounds of fraud or lack of jurisdiction or any other grounds.

5. Your petitioners having been legally divorced pursuant to the laws of the state of their residence or domicile and having intermarried with each other pursuant to the laws of said state, cannot by virtue of the provisions of Amendment XIV to the Constitution of the United States be convicted for bigamy or bigamous cohabitation upon moving from the state of their domicile or residence into North Carolina or any other state.

The foregoing constitutional questions were duly presented to the Supreme Court of North Carolina by both the record exceptions and the brief of your petitioners but that the Supreme Court of North Carolina held that it was not bound under the full faith and credit clause to give full faith and credit to the Nevada divorce decrees. The Supreme Court of North Carolina further held that it had the right, even in the absence of evidence, to infer that the Nevada divorce decrees were a sham and a fraud. The Supreme Court of North Carolina further held that Section 4342 of the North Carolina Code was not in violation of Amendment XIV to the United States Constitution. The Supreme Court of North Carolina further held that your

petitioners' plea of former jeopardy under Amendment V of the United States Constitution was not available to them.

The court also has jurisdiction by virtue of the allowance of the petition for certiorari granted on June 12, 1944.

Summary of Case.

Your petitioners, O. B. Williams and Lillie Shaver Hendrix (the names under which your petitioners were indicted), respectfully show unto the Court that the said O. B. Williams and Lillie Shaver Hendrix established a bona fide residence in the State of Nevada and that such residence was adjudged to be bona fide (See R. 21 & 22), and upon such adjudication were duly awarded a decree of divorce, after fully complying with the due process clause of the Federal Constitution, and the laws of the State of Nevada, from their respective spouses, by a court of competent jurisdiction in the State of Nevada. Subsequent to the rendition of the decree of divorce, your petitioners intermarried with each other in the State of Nevada and in full accordance with the laws of that State. Subsequent to their intermarriage with each other, your petitioners removed to the State of North Carolina and the State of North Carolina, under Section 4342 of the North Carolina Code, defining the alleged crime of bigamous cohabitation (See Appendix I), indicted your petitioners.

That your petitioners were first tried before His Honor, H. Hoyle Sink, who imposed long prison terms upon your petitioners. That your petitioners appealed to the Supreme Court of North Carolina, which judgment was affirmed. That upon the affirmation of said judgment, your petitioners applied for writ of certiorari to the Supreme Court of the United States, which petition was granted. That pursuant to the petition granted in that case, the cause was argued in the Supreme Court of the United States at the October

Term, 1942, when and where the United States Supreme Court reversed the Supreme Court of North Carolina and held that North Carolina would be obliged to give full faith and credit to the Nevada divorce decrees involved in this action.

That subsequent thereto, the Supreme Court of North Carolina, in its effort to overrule the Supreme Court of the United States, attempted to "vacate" its judgment, which had already been reversed by the United States Supreme Court, and attempted to order a new trial without the assignment of any errors whatsoever.

The trial Court of Caldwell County retried the case over the objections of the defendants and over their plea of former jeopardy.

Upon the second trial of your petitioners in the Superior Court of Caldwell County, the jury again returned a general verdict of guilty. When and where His Honor, S. J. Ervin, Jr., imposed prison sentences as appear of record (R. 4 & 5).

Your petitioners again appealed to the Surpeme Court of North Carolina, which Court affirmed the judgment of the lower court, and that decision is reported under the style name of *State* v. *Williams, et al.*, 224 N. C. 183. That your petitioners again petitioned the United States Supreme Court for writ of certiorari, which writ was granted June 12, 1944, and is reported in 88 L. Ed. 1184.

Assignment of Errors.

Assignment of Error No. 1: Your petitioners and each of them assign as error the action of the Court in overruling their special appearances and motion to dismiss under their plea of former jeopardy. (R. 77).

Assignment of Error No. 2: Your petitioners and each of them assign as error the action of the Court in overruling

their motion to set aside the verdict of the jury for the reasons stated in said motion, (R. 78).

Assignment of Error No. 3: Your petitioners and each of them assign as error the refusal of the court to allow their motion in arrest of judgment for the reason that Section 4342, under which your petitioners were indicted, tried, and convicted, is unconstitutional by virtue of the Fourteenth Amendment to the United States Constitution (R. 79).

Assignment of Error No. 4: Your petitioners and each of them assign as error the judgment entered against them imposing prison sentences for the reason that said judgment is contrary to the former decision of the United States Supreme Court in this identical case, (R. 79).

Assignment of Error No. 5: Your petitioners and each of them assign as error the refusal of the court to allow their motion for judgment as of nonsuit at the close of the State's evidence, which judgment was renewed at the close of all of the evidence and which motion raised the question (a) of the full faith and credit clause of the United States Constitution; (b) the constitutionality of Section 4342 of the North Carolina Code; (c) that the adjudication by a court of competent jurisdiction in Nevada upon the question of the good faith of the residence of your petitioners in that State was *res judicata*, (R. 79).

Assignment of Error No. 6: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters E to F, (R. 79), which is as follows:

> "Where the State seeks the conviction of an accused upon a charge of bigamous cohabitation, the State has the burden of proving beyond a reasonable doubt from the evidence four facts, namely: (1) That the accused

was lawfully married to one person; (2) That thereafter the accused contracted a second marriage with another person outside of North Carolina; (3) That the spouse of the accused by the former marriage was living at the time the second marriage was contracted by the accused outside of North Carolina; (4) That after contracting the second marriage outside of North Carolina, the accused cohabited in North Carolina with the person with whom he had contracted such second marriage.

When these four facts are shown by the State beyond a reasonable doubt from the testimony in a prosecution for bigamous cohabitation, the State has made out what the law calls a prima facie case, and is not bound to go further and prove that the former marriage has not been dissolved by divorce, knowledge as to such dissolution being peculiarly within the cognizance of the accused."

Assignment of Error No. 7: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters G to H, (R. 79), which is as follows:

When the State proves the four facts enumerated by the Court as constituting a prima facie case beyond a reasonable doubt from the testimony, "the burden then devolved upon the accused to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy the trial jury from facts or circumstances offered in evidence either by the State or by the accused or by a co-defendant, that the accused was lawfully divorced from his first spouse at the time of his second marriage, if the accused in the prosecution for bigamous cohabitation relies upon the dissolution of his first marriage by divorce as a defense."

Assignment of Error No. 8: Your petitioners and each of them assign as error that portion of the court's charge

embraced within the letters I to J, (R. 79), which is as follows:

> "The Court instructs you that in the prosecution of the defendant, O. B. Williams, upon the charge of bigamous cohabitation, the law casts upon the State the burden of showing four things beyond a reasonable doubt from the evidence, in order to constitute a prima facie case as against the defendant, O. B. Williams. These four things are as follows: (1) That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Wike Williams, a woman, before the times named in the bill of indictment; (2) That after his marriage to Mrs. O. B. Wike Williams, namely, on or about the 4th day of October, 1940, the defendant, O. B. Williams, contracted a marriage with the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, in the State of Nevada; (3) That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, Mrs. O. B. Wike Williams, his wife by his former marriage, was still living; and (4) That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams, and his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, cohabited together in the State of North Carolina."

Assignment of Error No. 9: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters K to L, (R. 80), which is as follows:

> "If the State, however, should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of these four things existed in the case of O. B. Williams, then it would be your duty to return a verdict finding the defendant, O. B. Williams

guilty of bigamous cohabitation, as charged in the bill of indictment, unless the defendant O. B. Williams should satisfy you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant, that at the time of his alleged marriage to his co-defendant in the State of Nevada, he was lawfully divorced from the bond of his former marriage to Mrs. O. B. Wike Williams, and to do that, upon such finding being made by you, the defendant, O. B. Williams, would have to satisfy you from facts or circumstances offered in evidence, either by the State or by himself or by his co-defendant, that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County entered the decree of divorce in the suit therein instituted between Otis B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, the defendant, O. B. Williams, had his domicile in the State of Nevada."

Assignment of Error No. 10: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters M to N, (R. 80), which is as follows:

"and if the defendant O. B. Williams, should satisfy you from facts or circumstances in evidence that at the time the Court in Nevada rendered the alleged decree of divorce set forth in the certified copy of the record from the State of Nevada that he, O. B. Williams, had his domicile in the State of Nevada, then it would be your duty to return a verdict of not guilty as to the defendant, O. B. Williams."

Assignment of Error No. 11: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters O to P, (R. 80), which is as follows:

"and if the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in evidence that at the time of the rendition of the alleged decree of di-

vorce in the suit between O. B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, in the State of Nevada, the defendant, O. B. Williams, was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams."

Assignment of Error No. 12: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters Q to R, (R. 80), which is as follows:

"That after the marriage between Tom Hendrix and the defendant Lillie Shaver Hendrix or Lillie Shaver Williams, namely on or about the 4th day of October, 1940, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted a marriage with her co-defendant, O. B. Williams, a man, in the State of Nevada."

Assignment of Error No. 13: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters S to T, (R. 80), which is as follows:

"If the State, on the contrary, however, should satisfy you beyond a reasonable doubt from the testimony that each and every one of those four things enumerated by the court co-existed with respect to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, then it would be your duty to return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty of bigamous cohabitation, unless the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, should satisfy you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfy you from facts or circumstances offered in evidence either by the State or by herself or by her co-defendant, that at the time of her alleged marriage to her co-defendant, O. B. Williams, in the

State of Nevada, she was lawfully divorced from the bond of her alleged first marriage to Tom Hendrix, and do that, upon such a finding being made by you, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, would have to satisfy you from facts or circumstances offered in evidence that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County rendered the alleged decree of divorce in a suit therein pending between Lillie Shaver Hendrix or Lillie Esther Hendrix and Thomas George Hendrix, the defendant Lillie Shaver Hendrix or Lillie Shaver Williams had her domicile in the State of Nevada."

Assignment of Error No. 14: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters U to V, (R. 80), which is as follows:

"therefore the State is not required to prove beyond a reasonable doubt from the testimony that a person entering into an alleged first marriage had the capacity to contract such marriage."

Assignment of Error No. 15: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters W to X, (R. 80), which is as follows:

"Now, the Court has told you that the defendants are charged with what is known in law as bigamous cohabitation and during the course of its charge, the court has used and will use the word cohabitation because the statute provides that one of the essential elements of bigamous cohabitation is that the accused must cohabit in the State of North Carolina with the person with whom he is alleged to have contracted a second marriage outside of North Carolina."

Assignment of Error No. 16: Your petitioners and each of them assign as error that portion of the court's charge

embraced within the letters Y to Z, (R. 81), which is as follows:

> "and that on one or more occasions one of the defendants stated in the presence of the other that they were married to each other, and that on one occasion the feme defendant stated that she was now Mrs. Williams."

Assignment of Error No. 17: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters AA to BB, (R. 81), which is as follows:

> "but such recitation does not compel you to make such an inference, for you may find from the evidence that notwithstanding such recitation, the defendant Lillie Shaver Hendrix or Lillie Shaver Williams was not in fact or in truth domiciled in Nevada. The same rule applies to the recitations in the record of the proceeding instituted in Nevada by the defendant, O. B. Williams, and the court here charges you that the recitation in such record to the effect that the defendant O. B. Williams was and was found to be a bona fide resident of Nevada for more than six weeks immediately preceding the institution of his action for divorce constitutes prima facie evidence that the defendant, O. B. Williams was a bona fide resident of Nevada domiciled in Nevada at the times recited. By this it is meant that such recitation is sufficient of itself to warrant your finding that the defendant O. B. Williams was a bona fide resident of Nevada domiciled in Nevada at the times recited in such recitation, but such recitation does not compel you to make such finding, for you may find that notwithstanding such recitation the defendant O. B. Williams was not in fact domiciled in the State of Nevada."

Assignment of Error No. 18: Your petitioners and each of them assign as error that portion of the court's charge

embraced within the letters CC to DD, (R. 81), which is as follows:

> "and that Caldwell County, North Carolina, was the domicile of O. B. Williams and Mrs. O. B. Wike Williams."

Assignment of Error No. 19: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters EE to FF, (R.81), which is as follows:

> "The State contends that you ought to find that the two defendants left their fixed homes in Caldwell County, North Carolina, and went to Nevada simply and solely for the purpose of securing divorces in Nevada and with the purpose at all times of returning to North Carolina as soon as they obtained such divorces."

Assignment of Error No. 20: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters GG to HH, (R. 81), which is as follows:

> "but never in the State of Nevada insofar as the evidence discloses."

Assignment of Error No. 21: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters II to JJ, (R. 82), which is as follows:

> "The State contends that it has shown you as to each defendant beyond a reasonable doubt the four essential elements necessary to make out a prima facie case as against each of the defendants and insists that you cannot be satisfied that at the time of their marriage to each other in Nevada that the defendants or either of them had been lawfully divorced from their respective spouses by their former marriages. The State

contends that the defendants were domiciled in North Carolina and went to Nevada merely for the purposes of securing divorces and that they intended at all times to return to North Carolina as soon as they obtained such divorces and that they did return to North Carolina pursuant to their intentions as soon as they obtained divorce decrees."

Assignment of Error No. 22: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters KK to LL, (R. 82), which is as follows:

"The Court instructs you that if you should be satisfied from the evidence beyond a reasonable doubt that each and every one of the following four elements existed with respect to the defendant, O. B. Williams, namely:

1. That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Williams, a woman, before the times named in the bill of indictment;

2. That after the marriage between the defendant, O. B. Williams and Mrs. O. B. Wike Williams, namely on the 4th day of October, 1940, the defendant, O. B. Williams contracted a marriage with the defendant, Lillie Shaver Hendrix, a woman, in the State of Nevada;

3. That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, Mrs. O. B. Wike Williams, his wife by a former marriage, was still living;

4. That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams, and his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, cohabited together in the State of North Caro-

lina, then you will return a verdict finding the defendant, O. B. Williams, guilty of bigamous cohabitation, as charged in the bill of indictment, unless the defendant, O. B. Williams, satisfied you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant that at the time the Eighth Judicial District Court in the State of Nevada in and for Clark County granted a decree of divorce in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada."

Assignment of Error No. 24: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters MM to NN, (R. 82), which is as follows:

"If the State should satisfy you beyond a reasonable doubt from the evidence in the case that all four of the essential elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant, O. B. Williams, and if the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in the evidence that at the time the Eighth Judicial District Court in the State of Nevada rendered the decree of divorce in his favor in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams.

If the State should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of the four essential elements enumerated by the Court as necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant, O. B. Williams, and if the defendant, O. B. Williams, has satisfied you from the facts and circumstance offered in evidence, either by the State or by himself or by his co-defendant, that at the time the Eighth Judicial District Court in the State of Nevada in and for Clark County rendered a

decree of divorce in his favor and against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada, then you would return a verdict of not guilty as to the defendant, O. B. Williams."

Assignment of Error No 24: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters OO to PP, (R. p. 84), which is as follows:

"The Court instructs you, however, that if the State has satisfied you from the evidence in the case beyond a reasonable doubt that these four essential elements existed as to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, namely:

1. That the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, was lawfully married to Tom Hendrix, a man, before the times named in the bill of indictment;

2. That after the marriage between the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and Tom Hendrix, namely on or about the 4th day of October, 1940, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted a marriage with her co-defendant, O. B. Williams, in the State of Nevada;

3. That at the time the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contracted a marriage with her co-defendant, O. B. Williams, in the State of Nevada, Tom Hendrix, her husband by a former marriage, was still living;

4. That after the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted the alleged marriage with her co-defendant, O. B. Williams, in the State of Nevada, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and her co-defendant, O. B. Williams, cohabited together in the State of North Carolina,—then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver

Williams, guilty as charged in the bill of indictment, unless the defendant Lillie Shaver Hendrix or Lillie Shaver Williams satisfied you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfies you from facts or circumstances offered in evidence, either by the State or by herself or by her co-defendant, that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered the decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, that she was domiciled in the State of Nevada."

Assignment of Error No. 25: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters QQ to RR, (R. p. 84), which is as follows:

"The Court instructs you that if the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, existed as to such defendant, and if the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, has failed to satisfy you from facts or circumstances in evidence that she was domiciled in the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty as charged in the bill of indictment."

Assignment of Error No. 26: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters SS to TT, (R. p. 84), which is as follows:

"If the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and

every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and if the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, has satisfied you from facts or circumstances in evidence that she was domiciled in the State of Nevada at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver *Hendrix*, not guilty."

Argument.

It is to be observed that in the former hearing on certiorari, in the identical case of *Williams, et al.* v. *North Carolina*, 87 L. Ed. 279, the State of North Carolina, through its duly constituted representatives, admitted that the evidence appearing of record was sufficient to establish at least a colorable bona fide residence in the State of Nevada on the part of your petitioners. It is inconceivable that on the second trial of this cause of action that the State of North Carolina will be permitted to retract its former admission and take the position that there is no evidence appearing of record establishing the bona fides of the residence of your petitioners in the State of Nevada and especially so in view of the fact that the second trial was had upon the identical evidence which was received in the first trial and upon the identical bill of indictment upon which these petitioners were first tried.

Divorce Decrees Were Granted With Due Process in Accordance With the United States Constitution and in Accordance With the Laws of Nevada.

(See *Pennoyer* v. *Neff*, 95 U. S. 714 and Appendix III Hereto Attached.)

Plea of Former Jeopardy.

Your petitioners, in the second trial of this cause of action relied upon their plea of former jeopardy under Amendment V to the United States Constitution which provides, among other things, as follows, to-wit: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

In *Ball* v. *U. S.*, 41 L.-Ed. 300, the facts were that Ball, along with other persons, was indicted for murder. The bill of indictment was fatally defective, but the persons were tried upon that bill of indictment. Ball was acquitted and upon an appeal to the United States Supreme Court by the other defendants, it was held that the bill of indictment was fatally defective. Upon a new presentment and a new bill of indictment, Ball was again indicted for murder. The court held that his plea of former jeopardy must be allowed despite the fact that the original bill of indictment was fatally defective.

In the case at bar, the defendants did not ask for or procure a new trial for any error committed by the trial court or by the Supreme Court of North Carolina, but asked for an outright reversal under the pertinent provisions of the fundamental law of the land, which prayer was granted by this Honorable Court. This Court ordered no new trial and assigned no error, except that North Carolina was obliged, under the full faith and credit clause, to give full recognition to the Nevada divorce decrees when they appeared to be regular on the face thereof and no evidence

was offered by the State impeaching said decrees. Therefore, your petitioners believe, argue, and contend that the North Carolina Supreme Court was without any jurisdiction to "vacate" its opinion, which had theretofore been reversed by the Supreme Court of the United States, and that the action of the Supreme Court of North Carolina in "vacating" its opinion and ordering a new trial of your petitioners before the jury in the Superior Court of Caldwell County was and is a complete nullity and without foundation in the law.

After diligent search, your petitioners have been unable to locate any decision involving Federal questions where a State Supreme Court has completely disregarded the action of the United States Supreme Court and again placed the defendant on trial upon the identical bill of indictment and the identical evidence which had theretofore been lifigated through the highest court in the land and a judgment rendered by said court in favor of your petitioners. In *Christmas* vs. *Russell* 5 Wall. 290, it is held, "Where the jurisdiction has attached, the judgment is conclusive for all purposes and is not open to inquiry upon the merits."

In the most recent case of *Magnolia Petroleum Company* vs. *Hunt*, 88 L. Ed. 161, Mr. Chief Justice Stone, writing for the Court, said "From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other", citing the folowing cases for that position.

Hampton v. *M'Connel*, 3 Wheat. (U. S.) 234, 235, 4 L. Ed. 378, 379; *Christmas* v. *Russell*, 5 Wall. (U. S.) 290, 18 L. Ed. 475; *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039, 28 S. Ct. 641; *Kenney* v. *Supreme Lodge, L. O. M.*, 252 U. S. 411, 64 L. Ed. 638, 40 S. Ct. 371; 10 ALR 716; *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 80 L. Ed. 220, 56 S. Ct. 229; *Davis* v. *Davis*, 305 U. S. 32, 40; 83 L. Ed.

26, 29, 59 S. Ct. 3, 118 ALR 1518; *Titus* v. *Wallick*, 306 U. S. 282, 291, 292, 83 L. Ed. 653, 659, 660, 59 S. Ct. 557; *Williams* v. *North Carolina*, 317 U. S. 287, 87 L. Ed. 279, 63 S. Ct. 207, 143 ALR 1273, supra.

North Carolina Bound by United States Supreme Court.

It has heretofore been a recognized principle of the law and the profession as relied upon the principle to the effect that state courts, when Federal questions are involved, are bound by the decisions of the United States Supreme Court. Article 4, Section 1 of the United States Constitution, among other things, provides as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Indeed North Carolina has, up until the appearance of the case at bar before it, recognized this fundamental principle.

In the case of *Yerys* v. *New York Life Insurance Company*, 210 N. C. 442 (1936) where the question involved was whether or not the State Supreme Court was bound by the adjudication of a question of fact by the Circuit Court of Appeals, the Court held: "The defense of invalidity is not available to the defendant in the present action, neither is it entitled to be heard again on the question of reformation or cancellation nor on the subject of its counterclaim. These matters were considered in a forum of its own choosing. They are now *res judicata* • • • it is a familiar maxim that a man shall not be twice vexed for the same cause. If a final judgment or decree is rendered, the parties cannot again be heard upon any matter which was then litigated and determined, the controversy having passed *in rem judicatam* and become conclusive between the parties."

Divorce Decrees Regular on Their Face Cannot Be Collaterally Attacked Except for Fraud.

In *Wade* v. *Dick*, 36 N. C. 313, it is held: "Jurisdiction having once been acquired over the parties and the subject matter, every presumption is in favor of the legality of the judgment."

In *Eure* v. *Paxton*, 80 N. C. 17, it is held: "A final decree rendered by a court of competent jurisdiction can be impeached only in a direct proceeding for that purpose."

It is respectfully submitted that in the case at bar, the State of North Carolina would be obliged to file a motion in the cause for the impeachment of the Nevada decrees involved in this controversy in order to impeach such judgments. See *Buffer* v. *Brunson*, 125 S. E. 619, 188 N. C. 789.

In *Wood* v. *Sugg*, 91 N. C. 93, 49 Am. Rep. 639 where the question of the adjudication of a dower right had been decided by final judgment, the North Carolina Supreme Court held that the heirs at law were estopped to impeach the judgment entered therein.

And in *Johnson* v. *Whilden*, 88 S. E. 223, 171 N. C. 153, the North Carolina Supreme Court held a judgment of the court having jurisdiction of the parties and of the subject-matter cannot be attacked collaterally.

In *Stocks* v. *Stocks*, 179 N. C. 285, 102 S. E. 306, the Court held: "A decree of a court having jurisdiction in a proceeding in all respects regular on its face as to parties, canot be attacked collaterally."

In *Spillman* v. *Williams*, 91 N. C. 483, it is held: "An irregularity in making service by publication affords no ground for a collateral impeachment of the judgment."

It is therefore respectfully submitted that when the State of North Carolina considered the legality of the Nevada divorce decrees involved in this controversy, it was incum-

bent upon the State, since the decrees were regular on their face, to offer some evidence supporting its challenge and until such evidence was offered by the State of North Carolina which was worthy of belief, the State of North Carolina was bound under the full faith and credit clause to give, not some, but full recognition to the judgments of the courts of Nevada dissolving the bonds of matrimony between your petitioners and their respective ex-spouses.

Facts Once Litigated by a Court of Competent Jurisdiction Cannot Be Again Litigated in the Courts of Another State.

Christmas v. *Russell, supra; Magnolia Petroleum Company* v. *Hunt, supra.*

It is to be observed that the plaintiffs in error were adjudged to be bona fide citizens of the State of Nevada (See R. 85 & 86). This finding of fact by the Nevada Court of competent jurisdiction was not attempted to be impeached in the trial of this cause. Such finding of fact is conclusive and binding upon the courts of the State of North Carolina and cannot be collaterally attacked. In *Harding* v. *Harding*, 49 L. Ed. 1066, this Court held that a final decree in chancery is as conclusive as a judgment at law and that the courts of one State must allow to a judgment of a sister State the same effect that it has in the State where rendered.

In 34 *Corpus Juris*, page 1127, Section 1603, the following is stated to be the law:

> The judgment of a court of one State, when sued on, pleaded or introduced in evidence in another State, is entitled to receive the same faith, credit, and respect that is accorded to it in the State where rendered, so that if valid and conclusive there, it is so in all other States. But a judgment from another State is entitled to no greater effect or finality than would be accorded to it in the State where

rendered; and hence if it would there be inconclusive, impeachable, or re-examinable, it will receive no greater consideration or measure of finality in other States. "*The validity and effect of a judgment must therefore be determined by reference to the laws of the State where it was rendered. If a judgment is valid in the State where it is rendered, it will be given full faith and credit in another State, without inquiring whether the domestic courts would or could have rendered such a judgment, whether such a judgment would have been valid under the local laws, or whether the court rendering the judgment was right or wrong in the interpretation and application of the laws of its own State, or even in its reading and application of the laws of the State where the judgment is brought in question. The rule has been held to apply, although the cause of action or statute upon which the judgment is based is against the law and public policy of the State or territory in which enforcement is sought.*" Also the judgment will be accorded the effect given it in the State of its rendition, although a similar judgment of a home tribunal would not have the same effect. On the other hand, it has been held that a judgment of a sister State will be disregarded if to enforce and recognize such judgment would in effect nullify the obligations imposed by law in the State of the forum between citizens thereof. For the purpose of determining the laws of the State where the judgment was rendered it is held in some of the states that the Courts of one State may take judicial notice of the laws of another State; but this doctrine is not generally accepted. On the contrary, it is held that laws of a foreign State must be proved as facts, and if there is no evidence in regard to the laws of the State where the judgment was rendered, the court where it is sought to be enforced will presume that those laws are the same as the laws of its own State, and will give effect to the judgment accordingly.

In 19 Corpus Juris, page 179, Section 445, where the law deals particularly with the status of persons, it is held;

Except as to the subsequent status of the parties, that is, that they are no longer husband and wife, a decree is conclusive of the matters determined only when it is set up against a party to the divorce suit; but it does not settle the status of their prior relations so as to render them valid as to the whole world regardless of whether or not they were so in fact. In New York a decree of divorce is binding on a corespondent who appears and contests the allegations of adultery, notwithstanding he is afterward placed in default, but otherwise if he has not appeared.

In 34 Corpus Juris, page 1135, Section 1611, it is held:

A judgment rendered in another State by a court having jurisdiction is conclusive not only as to all matters which were actually in issue and decided in that suit, or which were necessarily implied in, or to be inferred from the judgment; in the sense that the judgment could not have been rendered without the finding or determination of such matters, but also as to other matters which the parties might have litigated and which might have been decided as incident to, or essentially connected with, the subject matter of the litigation within the purview of the original action, either as a matter of claim or of defense. Even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. But a judgment is not conclusive as to any matters which might have been brought into the litigation, or causes of action which plaintiff might have joined, but which in fact were neither joined nor embraced by the pleadings.

Divorce Action Is an Action in Rem.

The plaintiffs in error contend that it is universal law that an action for divorce is one *in rem* affecting the marital status only and that such action being an action *in rem* substituted service is universally recognized as a legal and proper way to confer jurisdiction of the status upon the court rendering the decree when one of the parties is a bona fide citizen and within the jurisdiction of such court. Divorce actions have been held to be actions *in rem* in the following cases:

Garner v. *Garner*, 56 Md. 127; *Hood* v. *Hood*, 110 Mass., 463; *Ferrell* v. *St. Paul*, 64 N. W., 809 (Minn.); *Gould* v. *Crow*, 57 Mo. 200; *Page* v. *Baker*, 76 N. Y., 78; *Ditson* v. *Ditson*, 4 R. I., 87; *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689; *Miller* v. *Miller*, 200 Io. 1193; *Freet* v. *Holdorf*, 205 Io. 1081; *Kendrick* v. *Kendrick*, 188 Mass. 550; *Keenan* v. *Keenan*, 40 Nev. 351; and indeed North Carolina recognizes a divorce action to be an action *in rem* (see Appendix H), in that said State of North Carolina authorizes by the statute set forth as Appendix H the granting of a divorce upon service by publication.

Action for Divorce Being One in Rem Service by Publication Is Valid.

The distinction between an action *in personam* and an action *in rem* is that in the first instance a judgment rendered operates so as to require the party against whom same is rendered to do some personal act. Obviously in such a case actual and personal service must be had. But in the latter case, that is an action *in rem*, the judgment does not operate against the person of the defendant but serves

only to affect the "thing" in litigation. In a divorce action the decree entered affects only the marital status and does not operate as a judgment *in personam*.

In *Pennoyer* v. *Neff*, 95 U. S. 714, it is held that substituted service in an action *in rem* or *quasi in rem* is a valid service if authorized by the laws of the forum. To the same effect is *Gassert* v. *Strong*, 38 Mont. 18, *White* v. *Glover*, 116 N. Y. S. 1059.

Likewise the case of *Millikan* v. *Meyer*, 85 L. Ed. 278, holds that service by publication in actions *in rem* or *quasi in rem* is valid.

North Carolina Courts under Article IV, Section I of the Constitution of the United States Are Required to Give Full Faith and Credit to the Nevada Decrees.

Addressing ourselves to Assignment of Error 5, it is to be observed that under the criminal procedure of North Carolina a motion for judgment as of nonsuit at the close of the State's testimony, which motion is renewed at the close of all of the testimony, raises all the legal questions Federal as well as state which may be and were argued upon such motion.

By the overwhelming weight of authorities throughout the United States, it is held that a judgment rendered in one State, pursuant to and in accordance with the laws of that State, shall be recognized and given full faith and credit in every other State in the union when the same has been duly authenticated in accordance with the acts of Congress. In *Faris* v. *Hoge*, 298 F. 727, it was held that a decree of divorce will be given the same effect in any court within the United States as it is given in the jurisdiction where rendered. Then in *Frey* v. *Frey*, 58 F.

2d, 1046, the court held that if a divorce decree was valid in the jurisdiction where the same was rendered then it is valid everywhere. *Davis* v. *Davis*, 83 L. Ed. 26, which is a recent case, held that if the decree of divorce was valid in the jurisdiction rendering it, it must be recognized, upheld and given full force and effect in every other jurisdiction. The decision in *Davis* v. *Davis* affirms the principle laid down in *Loughran* v. *Loughran*, 292 U. S. 216. This principle was first adopted by the United States Supreme Court in the case of *Atherton* v. *Atherton*, 181 U. S. 155. A divorce action being an action affecting only the *res*, that is the marital status, and having been once adjudicated, it becomes *res judicata* and a bar to subsequent suit for the same relief. *Kirby* v. *Kirby*, 55 P. 2d 356; *Voorhies* v. *Voorhies*, 166 So. 121; *Cope* v. *Cope*, 196 A. 422. The foregoing is generally recognized to be the law regardless of the place of the marriage. *Voorhies* v. *Voorhies*, *supra*.

In *Cardinale* v. *Cardinale*, 68 P. 2d 351, and *Miller* v. *Miller*, 200 Iowa 1193; *Commonwealth ex rel. Cronhardt* v. *Cronhardt*, 193 A. 484, it is held that where a decree of divorce is regular on its face it is presumed to be valid in all respects. Following this presumption it is held in the same case and in *Renner* v. *Renner*, 181 A. 191, that the burden of proof in the face of a divorce decree regular upon its face rests upon the parties attacking such decree.

It is to be observed that in the case at bar no evidence of any kind was offered by the State of North Carolina attacking the divorce decrees in question for any reason or upon any ground.

Title 28, U. S. C. A. section 687 is the Congressional Enactment providing the manner in which judicial proceedings of another State may be authenticated. The Legislature of North Carolina has adopted that Congressional Enactment

and Appendix III, section 687 of the North Carolina Code is as follows:

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is to be observed that there is no law in North Carolina prohibiting citizens in North Carolina from migrating to other States and there establishing bona fide residence and avail themselves of the divorce laws of that State. 19 Corpus Juris, section 836, page 370, we find the following to be stated as a general proposition of law:

> "There is no rule of law, however, which prevents one from changing his domicile in order to facilitate his obtaining a divorce or to secure other advantages he may think that the laws of the new domicile may afford him; he is free to change at his pleasure, providing the change is a bona fide one and a divorce so acquired will be recognized in the State of his former domicile."

There certainly can be no question of fraud in the instant case since one of the parties was served with process by the sheriff of Caldwell County pursuant to a statute duly enacted in Nevada providing for such method of service, which statute is set forth as Appendix III.

The Petitioners Having Been Adjudged Bona Fide Citizens of the State of Nevada Are Entitled to All Privileges and Immunities Guaranteed by Article IV, Section II of the Constitution of the United States.

The Nevada Court received evidence upon the good faith of the residence of the petitioners and upon that evidence adjudged that the petitioners were bona fide residents.

In *Conner* v. *Elliott*, 15 L. Ed. 497, the court held that the privileges secured by this clause of the Federal Constitution were those privileges belonging to citizenship. It is observed that citizenship in the United States is paramount to citizenship in individual States. Otherwise there could be no solidity of the union. Should it be determined that citizens owe their first allegiance to the various States and a secondary allegiance to the United States then it is conceivable that such an attitude among the people generally would eventually result in a disruption of a union and the establishment of forty-eight or more separate and independent countries, and no question exists which would lead more readily to such a situation than the question of marriage and divorce. It is of the utmost importance that this Court adopt the principle of law that a divorce action is one *in rem*, and that service by publication is valid insofar as it affects the marital relationship of the parties. To like effect is the case of *Cole* v. *Cunningham*, 33 Fed. 538.

The North Carolina Statute Involved in This Action, To-wit, Appendix I, Herein Is Unconstitutional.

Said statute is unconstitutional in that under the court's construction thereof, it extends the legislative powers of the State of North Carolina into the State of Nevada and by judicial interpretation attempts to legislate what shall be a legal divorce and a legal marriage in the State of Nevada.

In Amendment XIV of the Constitution of the United States, it is provided among other things as follows: "No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It cannot be doubted and is not questioned that the petitioners were citizens of the United States. It cannot be doubted that their residence in the State of Nevada was bona fide since the court received evidence upon that question and adjudicated that the petitioners were bona fide residents and the State of North Carolina offered no evidence challenging that adjudication. If the petitioners were bona fide residents, which up until now has not been questioned by competent evidence, then the Courts of Nevada had the right to render a binding decree of divorce and likewise the Courts of Nevada had the right to issue marriage license and determine when the petitioners were legally married in that State.

In the case of *Connolly v. Union Sewer Pipe Company*, 46 Lawyers Edition 679, this Court held that the State has undoubtedly the power by appropriate legislation to protect the public health and public safety, if, by their necessary operations, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.

It is to be observed that the North Carolina statute involved, to-wit, Appendix I, creates a crime unknown to the common law without any regard to the intent of the parties and said statute is therefore unconstitutional. In *Ratcliff v. The State of Texas*, 289 S. W. 1072, it is held that a statute creating an offense from an act without respect to the intention of the parties is unconstitutional and invalid.

The petitioners further contend that the statute, to-wit, Appendix I, under which they are indicted, does not apply to them for the reason that under the specific terms of said

statute, persons lawfully divorced are not within the provision of said statute; that the legality of their divorce obtained in Nevada pursuant to and in accordance with the laws of Nevada, has not been challenged or questioned in any manner by the State of North Carolina other than the North Carolina courts placed upon the petitioners the burden of proving the good faith of their residence in the State of Nevada. In other words, the courts required the petitioners to prove themselves innocent, rather than requiring the State to prove them guilty. Such a position is contrary to Amendment V of the Constitution of the United States and to Article I, Section 11, of the North Carolina Constitution. This instruction extends the provisions of the statute and the judicial decrees of North Carolina to the State of Nevada and answers arbitrarily and negatively the legality of Nevada laws and that such extension of legislative power is unconstitutional under and by virtue of the provisions of the Fourteenth Amendment of the Constitution of the United States. The petitioners contend that this Court should so hold.

Discussion of Bell v. Bell

The opinion of the Supreme Court of North Carolina rendered on the second appeal in this case, as appears of record page 106, closes with the following statement:

> "From a legal standpoint, it all comes to this: On the first appeal the State relied on the case of Haddock *v.* Haddock. We were minded to follow that case. It was overruled by the Supreme Court of the United States. The State now relies on the case of Bell *v.* Bell (181 U. S. 175, 45 L. Ed. 804). We are disposed to follow this case."

The Supreme Court of North Carolina in its second opinion in this case, filed on April 12, 1944, relied upon

Bell v. *Bell, supra*, from which the said court imagined a proposition of law which in no wise existed in that case. In *Bell* v. *Bell* the proposition involved was a right of action *in personam* rather than a right of action *in rem*, which latter is the case of your petitioners. In *Bell* v. *Bell, supra*, the defendant had gone temporarily to Pennsylvania and instituted his divorce action in that State. He had then returned to New York State, the State of his navity, and a few weeks before securing his decree of divorce in the courts of Pennsyvania, he had filed with the probate court in New York State an affidavit for the purpose of obtaining the probate of a will wherein he stated that he was a citizen and resident of New York State. This evidence was adduced by the party attacking the Pennsylvania divorce decree and the court was properly justified in finding, upon such evidence, that the defendant had never been a resident of the State of Pennsylvania.

Exactly the contrary is true in the case at bar. Your petitioners offered evidence in the courts of Nevada as to their intention with respect to their domicile and upon that evidence the court adjudicated as a matter of fact that your petitioners were bona fide residents of the State of Nevada. The State of North Carolina on the first trial of this action and on the second trial of this action offered no evidence of any kind, character, or nature which challenged the adjudication of the question of fact as to the bona fides of your petitioners' residence in the State of Nevada.

It is a well recognized principle of law that the party attacking the adjudication of a court of competent jurisdiction in a foreign state must offer some competent evidence which would support such attack rather than the relying upon its own inferences which were the basis of the instructions to the jury to the effect that said judgment was a sham and a fraud. (See authorities cited supra).

Domicile.

North Carolina contends that notwithstanding the fact that it admitted on the previous hearing before the United States Supreme Court that there was sufficient evidence in the record to establish a colorable domicile by your petitioners in the State of Nevada, that it is not now bound by that admission and that it has the right to infer, from the record in this case, that the domicile was a sham and a fraud.

It is conceded that under Amendment XIV of the Constitution of the United States, that your petitioners are first citizens and residents of the United States and then of the state wherein they reside. Obviously, citizenship in the United States is paramount to citizenship of the individual states. Your petitioners complied with the state laws of the State of Nevada and were adjudged to be bona fide citizens of that State and this adjudication is not open to attack in the State of North Carolina. An opinion to the contrary would have the logical result of freezing the citizenship of the various forty-eight states and prevent a free migration from one state to the other.

With respect to the question of domicile, Section 6, page 11, of 28 C. J. S. holds as follows:

> "A domicile of choice is the place which a person has elected and chosen for himself to displace his previous domicile; it has for its true basis or foundation the intention of the person. A person having more than one residence may choose which of them shall be his domicile, and his choice is final if made in good faith, although he may spend less time at his domicile than at his other residence."

Likewise Section 9, page 11, is as follows:

> "Domicile of choice is entirely a question of residence and intention, or, as it is frequently put, of

factum and animus. To constitute such a domicile, or to effect a change of domicile, there must appear both an actual residence in a particular locality and an intention to remain there or to make it one's home, or, as frequently stated, the fact of residence and the intent to remain must concur, or be coupled, or be found together; and the same union of act and intent, or actual location in, or removal to, a particular place with intent to remain, has been required for "residence" or "legal residence", or a change thereof, in cases using those terms in the sense of domicile.

As soon as a point of time is reached when residence and intent concur, the domicile is obtained. It is not necessary that the intention to acquire a new domicile should exist at the time of removal, as the animus manendi may be formed afterward. Thus, if a person leaves his domicile, and while residing elsewhere forms an intention not to return, but to make his new residence his home permanently or for an indefinite period, he thereby acquires a new domicile."

In Section 10, same volume, page 14, defining what is necessary to establish a residence or domicile, the following is held to be the law:

"The physical character of the residence is of no importance in fixing the domicile, except as it may have a bearing on the question of intent, and it is immaterial whether the person lives in his own dwelling or in a hired house, or at a boarding house or hotel. Residence in some one particular house as a fixed place of abode is not essential.

A domicile may be any building or shelter used as a permanent residence, although not characterized by the usual appearance of a dwelling house or the ordinary comforts of a home. It may be a building detached from the principal residence, such as a dormitory for servants."

As between two residences, the place where a person sleeps may be determinative of his domicile.

"*Principal establishment.*" A statute fixing domicile at one's "principal establishment" means principal domestic establishment."

With respect to the length of duration, Sub-section b of Section 10, at page 14, is as follows:

"Except as the rule may be affected by statutory regulation, no particular period of residence or specified length of time in a particular place is required in order to establish a domicile, but when coupled with the element of intent to establish a domicile any residence, however short, will be sufficient, even if it is but for a day or an hour. Although a long-continued residence in one place has been regarded, in some decisions, as strong evidence, or even a controlling circumstance, in determining the question of domicile, residence alone, however long continued, will not establish domicile or effect a change of domicile, in absence of the requisite intention."

As to the meth l or purpose of establishing such residence or domicile, Sub-section c of Section 11, 28 C. J. S., page 17, provides as follows:

"If the requisite intention is shown to exist, the law will not, according to most authorities, scrutinize the motive or purpose prompting a change of domicile, however, some decisions have considered motive, particularly in determining whether the apparent intent was actual or merely pretended."

It is therefore respectfully submitted that under these authorities the State of North Carolina had no right, in the absence of positive proof, to assume or infer that the residences established in Nevada by your petitioners, and which residences had been adjudicated to be bona fide, were a sham and fraud in the absence of any evidence of any character whatsoever impeaching the judgments of the courts of the State of Nevada, adjudging your petitioners to be bona fide residents of said State.

The Court's Charge.

With respect to assignment of errors numbered 6 through 26, wherein the petitioners and each of them reserved exceptions to the charge of the court for the reason that the court placed upon the petitioners the burden of proving to the satisfaction of the jury the good faith of their residence in the State of Nevada, which instructions your petitioners believe is contrary to the provisions of the Constitution of the United States, as well as to the provisions of the Constitution of North Carolina.

Amendment V of the United States Constitution provides, among other things, as follows:

> "Nor shall (*any person*) (Itadies ours) be compelled in any criminal case to be a witness against himself."

Likewise, Article 1, Section 11, of the North Carolina Constitution provides as follows:

> "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself."

It is to be observed that with respect to the constitutional provisions of the North Carolina Constitution, your petitioners have never had the opportunity to confront any witnesses who challenged the bona fides of their residence and domicile in the State of Nevada, since there were no witnesses offered challenging the adjudication by the Nevada courts on the question of the good faith of their residence. Your petitioners assign as error the instructions of the court, as above referred to, as to this burden of proof, since if this be the law then the adjudication of a question of fact by a court of competent jurisdiction would be a complete nullity in every other state in the union except

where ajudicated, and it is conceivable that if that proposition be declared to be the law that your petitioners and other party, litigants might be compelled to re-litigate a question of fact which had been duly adjudicated in one state in every other state in the union to which they might perchance travel and thus there would be no end to litigation throughout the United States. Such is not the purpose of the law nor is it the purpose of the judicial system which has been developed through the years in this country. In the recent case of *Magnolia Petroleum Company v. Hunt*, supra, this court, speaking through Mr. Chief Justice Stone, held that facts once adjudicated by a court of competent jurisdiction was forever settled and was *res judicata* in every other state where the same may be brought into question.

Social Aspects of the Question Involved.

In *Vreeland* on "Validity of Foreign Divorce Decrees," 1938, at page 25, it is stated:

> "The question of divorce jurisdiction in the United States seems to be considered one of difficulty and confusion. While the more recent cases as a rule do not go deeply into the theory of the matter, not infrequently one sees articles and hears discussions stressing the complexity of the problem and ending with a statement to the effect that the Supreme Court of the United States should declare whether a divorce suit is *one in personam or in rem*."

The above quotation poses the question for this Court in the most apt language that the petitioners have been able to discover.

A decision by this Court sustaining the opinion of the Supreme Court of North Carolina would create havoc among literally thousands of married couples throughout the United States. To sustain this opinion can conceiv-

ably result in laws and judicial interpretation of laws in various states so that couples will be legally married in one state and living in adultery in all the other states to which they might perchance travel.

To sustain this opinion will completely upset property rights and the marital status of thousands of couples throughout the United States.

It is a matter of which the Court should take judicial notice that many people, there being no statutory prohibition, have established residences in states with the more liberal divorce laws and there obtained divorce and later remarried. Many children have been born to such unions and property rights have become vested by reason of the death of one or both of the parents and to sustain the opinion of the Supreme Court of North Carolina would not only declare illegal these marriages, but would bastardize the children born to said marriages and completely undermine the vested property rights of many American citizens who have been born, reared, and have inherited property from their respective parents under exactly the same situation as presented in the case at bar.

The State of North Carolina argues that it is against the public morals of said State to recognize the validity of a foreign divorce decree and many authorities are cited to that effect. The State of North Carolina, however, fails to recognize that in the cases cited by it, the question involved and litigated therein is a question *in personam* concerning which the foreign court did not attempt and could not litigate without jurisdiction of the right *in personam* by bringing both of the parties within the jurisdiction of the foreign court.

It is probably argued that the foreign court rendering the divorce decree could not acquire jurisdiction of the marital relationship unless both parties subjected themselves to the jurisdiction of the court rendering the decree.

This reasoning is fallacious in that the marital relationship is a status and that status accompanies each individual wherever that individual may establish a residence and it is not necessary therefore to have both parties within the jurisdiction of the court in order to adjudicate that status.

The anomaly of the situation is this. Suppose that two people from New York, Maryland, Virginia or any other State, had procured divorces in the State of Nevada, Arkansas, Virginia, or any other State in the Union, and had intermarried with each other and were traveling through North Carolina and perchance stopped at a hotel. Under the decision of the North Carolina Supreme Court such people might be indicted for bigamous cohabitation, and sentenced to serve a term in the State's Prison of North Carolina. Likewise persons who have been divorced and married under similar circumstances outside the State of North Carolina might perchance decide to establish permanent residence in North Carolina, and upon the establishment of such residence under North Carolina interpretation of the statute set forth in Appendix I, such persons could be indicted and convicted of bigamous cohabitation.

One of the questions, therefore, that this Court should consider most carefully with respect to public morals is whether or not it should declare illegal many thousands of marriages and bastardize many thousands of children when the children born of previous marriages cannot be affected by the decision of the court since they were born in lawful wedlock. WHY DESTROY THE LEGITIMACY AND PROPERTY RIGHTS OF CHILDREN BORN TO THE SECOND UNION WHEN SUCH DESTRUCTION WILL IN NO WISE ENHANCE THE RIGHTS OR PRIVILEGES OF CHILDREN BORN TO THE FIRST MARRIAGE?

Is it not better to recognize the validity of the foreign divorce decree and the foreign marriage, and thereforg,

maintain the integrity and union of thousands of homes as well as extend legitimacy and property rights of children born to the second marriage?

At the present time there are literally thousands of soldiers and defense workers located in camps and on defense projects in North Carolina, who have come from other States to the State of North Carolina, and certainly there are hundreds of them who have been divorced and remarried in other States, upon grounds which are not recognized by the laws of North Carolina. To enforce the interpretation placed upon Section 4342 of the North Carolina Code, that has been placed thereon by the Supreme Court of North Carolina, would subject every single couple living in North Carolina, and who came from outside the State, to indictment, conviction, and long prison terms under the alleged crime of bigamous cohabitation. Such a situation is intolerable for the reason that as has hereinbefore been stated, it would freeze the citizenship of the various States and prevent the free migration of citizens of the United States from one State to the other in normal times as well as in times of emergency, such as we are now facing.

It is therefore respectfully submitted by your petitioners that this honorable court should decree that a divorce action is one *in rem* because all of the States authorize service of summons by publication in divorce cases; that such action being on *in rem* service by publication or substituted service is valid and effective insofar as it affects the marital status and that the Nevada decrees involved in this controversy should be recognized by the State of North Carolina under the full faith and credit clause and other pertinent provisions of the Constitution of the United States, cited herein; it is further respectfully submitted that the State of North Carolina is bound by the decision of the United States Supreme Court in the former appeal in this identi-

cal case and that the Supreme Court of North Carolina was without authority to order a new trial of your petitioners when no error was assigned by the Supreme Court of the United States or by the North Carolina Supreme Court.

Your petitioners further respectfully submit that they having received a favorable decision at the hands of the United States Supreme Court on their former appeal that the same constitutes former jeopardy, could not legally be placed upon trial a second time for the identical crime upon the identical bill of indictment and with the identical evidence which had theretofore been adjudicated in this honorable Court.

WHEREFORE, your petitioners respectfully pray the court that the opinion of the North Carolina Supreme Court, rendered on their second appeal, be reversed and that your petitioners be set at liberty and that they have and recover the full cost of this second appeal.

Respectfully submitted,

W. H. STRICKLAND,
Lenoir, North Carolina;
Attorney for Petitioners.

APPENDIX I.

Section 4342 of the North Carolina Code: If any person, being married shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; *nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage;* nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

APPENDIX II.

Section 484 of the North Carolina Code: Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court

or judge may grant an order that the service be made by publication of a notice in either of the following cases:

5—Where the action is for divorce.

APPENDIX III.

Nevada Law. Section 8582 Service of Process Outside of Nevada When By Publication.

Section 84: When the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; such court or judge may grant an order that the service be made by the publication of the summons.

Provided, that when said affidavit is based on the fact that the party on whom service is to be made resides out of the state, it shall be a sufficient showing of such fact if the affiant shall state generally in such affidavit that at a previous time such person resided out of this state in a certain place (naming the place and stating the latest date known to affiant when such party so resided there); that such place is the last place in which said party resided to the knowledge of affiant; that such party no longer resides at such place; that affiant does not know the present place of residence of such party or where such party can be found; and that affiant does not know and has never been informed and has no reason to believe that such party now resides in this state; and, in such case, it shall be presumed that such party still resides and remains out of the state, and it shall not be necessary to use due or any diligence to find such party in this State, or to show by affidavit that due or any diligence was so used. As Amended, Stats., 1923, 275.

Section 2. Section 85 of an act entitled "An act to regulate proceedings in civil cases in this State, and to repeal all other acts in relation thereto," approved March 17, 1911, is hereby amended so as to read as follows:

Section 85: The order shall direct the publication to be thereof, for a period of four weeks, and at least once a week during said time. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be deposited in the post office directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the state, shall be equivalent to completed service by publication and deposit in the post office, and the person so served shall have thirty days after said service to appear and answer or demur. The service of the summons shall be deemed complete in cases of publication at the expiration of four weeks from the first publication, and in cases when a deposit of a copy of the summons and complaint in the post office is also required, at the expiration of four weeks from such deposit. As Amended Stats. 1931; 159.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 84

O. B. WILLIAMS and LILLIE SHAVER HENDRIX,

Petitioners

vs.

THE STATE OF NORTH CAROLINA,

Respondent

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

HARRY McMULLAN,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 999

O. B. WILLIAMS and LILLIE SHAVER HENDRIX,

Petitioners

vs.

THE STATE OF NORTH CAROLINA,

Respondent

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners, O. B. Williams and Lillie Shaver Hendrix, seek by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Caldwell County imposing sentence upon the petitioners for bigamous cohabitation. The opinion of the Supreme Court of North Carolina was filed April 12, 1944, and is reported as *STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX*, 224 N. C. 183.

FACTS

The petitioners were indicted for bigamous cohabitation under Section 14-183 of the General Statutes of North Carolina, the pertinent provisions of which follow:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

The evidence for the State showed that the petitioner Williams was married in North Carolina in 1916 to Carrie Wike Williams (R.6); that he lived here with his wife until May 7, 1940 (R.6); that Tom Hendrix, the husband of petitioner Hendrix, worked for petitioner Williams (R.7); that on May 15, 1940, petitioner Williams had left the State of North Carolina and was staying at the Alamo Court, Las Vegas, Nevada (R.44); that on June 26, 1940 (exactly six weeks after arrival in Nevada), by publication of summons, he instituted an action for a divorce in Nevada, in which action there was no appearance by the defendant (R.18); that a decree of divorce was granted by a Nevada court on August 26, 1940 (R.23); that petitioner Williams married petitioner Hendrix in Nevada on October 1, 1940 (R.8); that in the fall of 1940 the petitioners returned to North Carolina and lived in Pineola as husband and wife (R.11, 12, 13, 14, 15, 16); that petitioner Williams' first wife was still living at the time and had not procured a divorce (R.6).

The evidence for the State showed further that the petitioner Hendrix was married in North Carolina about 1920 to Tom Hendrix (R.7); that she lived in North Carolina with her husband until about May, 1940 (R.7); that she left the State suddenly, and on May 15, 1940, was staying at the same Alamo Court, Las Vegas, Nevada (R.40); that on June 26, 1940 (exactly six weeks after arrival), she instituted, by publica-

tion of summons, a suit for divorce in the State of Nevada, in which there was no appearance by Tom Hendrix, her husband; that a decree of divorce was granted by a Nevada court on October 4, 1940 (R.36); that on that same day (October 4, 1940) petitioner Hendrix was married to the petitioner Williams in Las Vegas, Nevada (R.8); that the petitioners immediately returned to Pinola, North Carolina, where they lived as husband and wife (R. 11, 12, 13, 14, 15, 16); that petitioner Hendrix' first husband, Tom Hendrix, was living at the time of this indictment and had not procured a divorce (R. 6).

The evidence also showed that the petitioners were gone from North Carolina only about three months (R. 8); that they employed the same attorney—L. S. Thompson, who was a lawyer practicing in Las Vegas, Nevada; and who also acted as Notary Public for both parties (R. 18 and 29), and that the petitioner Williams appeared as a witness for the petitioner Hendrix (R. 44).

The trial of this case proceeded upon the theory that no valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. The Supreme Court of North Carolina accepted the view of the State of North Carolina that the evidence showed that the petitioners acquired no domicile in Nevada, and, therefore, the divorce decrees granted in Nevada did not constitute a defense to this prosecution.

ARGUMENT

I

THE DENIAL OF PETITIONERS' PLEAS OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a state court. The Fifth Amendment, which provides that no person shall for the same offense

be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by states.

Barron v. Baltimore, 7 Pet. 243;
United States v. Lanza, 260 U. S. 377.

The petition for *certiorari* thus presents no federal question under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

Amrine v. Tines (1942), C.C.A. 10, 131 F. (2d) 827.
Compare: *Palko v. Connecticut*, 302 U. S. 319;
Maxwell v. Dow, 176 U. S. 581.

In Amrine v. Tines, *supra*, it is said, at page 838:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a state court, the petitioners' pleas of former jeopardy could only have raised questions concerning rights guaranteed them by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the petitioners were not twice placed in jeopardy for the same offense in contravention of the North Carolina Constitution. Compare *White v. Texas*, 310

U. S. 530. The decision on this point was, therefore, a decision of a state court with respect to a question arising under the constitution of the state. Such a question, the United States Supreme Court cannot review.

Crane v. Campbell, 245 U. S. 304;
Davis v. Ohio, 241 U. S. 565;
Graham v. West Virginia, 224 U. S. 616.

II

THE WRIT OF CERTIORARI SHOULD BE DENIED, FOR THE FEDERAL QUESTIONS PRESENTED HAVE ALREADY BEEN DECIDED ADVERSELY TO THE PETITIONERS.

It is not disputed that Federal questions, *viz.*, whether the Nevada divorce decrees were entitled to recognition in North Carolina under Article IV, Section 1, and Amendment XIV of the Constitution of the United States, were decided in the trial of this case in the State court. However, under the rules and the decisions of this Court review on writ of *certiorari* is a matter not of right but of discretion. The fact that the Federal questions decided in the State court have previously been decided adversely to the contentions of the petitioners is a sufficient reason for denying the writ.

Utley v. St. Petersburg, 292 U. S. 106;
Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416.

The single question presented by this portion of the petition is whether a recital in a divorce decree that the plaintiff is a bona fide resident of the state granting the divorce (the defendant in the action not being domiciled in the state granting the divorce and not being personally served with process in the state and making no appearance in the action), is conclusive on other states. If this question is to be answered in the affirmative, the Nevada divorces and subsequent marriage

of petitioners constituted a defense to the prosecution in North Carolina. Otherwise, they did not.

It is respectfully submitted that this question has been answered in the negative by the decision of this Court in *Bell v. Bell*, 181 U. S. 175. Compare: *Streitwolf v. Streitwolf*, 181 U. S. 179; *Andrews v. Andrews*, 188 U. S. 14.

In *Bell v. Bell, supra*, Mr. Justice Gray says:

> "The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted."

The petitioners seek to distinguish *Bell v. Bell*, 181 U. S. 175, on the ground that there the evidence showed that Bell was not domiciled in the state granting the divorce decree. Here, petitioners contend, the evidence is not sufficient to show that they were not domiciled in Nevada. This does not present a Federal question.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United State Supreme Court on writ of *certiorari*.

> *Noble v. Mitchell*, 164 U. S. 367;
> *American Railway Exp. Co. v. Kentucky*, 273 U. S. 269;
> *Bell Telephone Co. v. Pennsylvania Public Utilities Commission*, 309 U. S. 30.

The following paragraph from the opinion of Justice White in *Noble v. Mitchell*, 164 U. S. 367, 373, would seem to be decisive of this phase of this contention:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. *Dower v. Richards*, 151 U. S. 659 (38:306); *Re Buchanan*, 158 U. S. 31 (39:884)."

III

THE WRIT OF CERTIORARI SHOULD BE DENIED, FOR THE CONSTITUTIONALITY OF THE STATUTE UNDER WHICH PETITIONERS WERE CONVICTED HAS ALREADY BEEN DECIDED ADVERSELY TO THEM.

The statute is not, as contended by the petitioners, extra-territorial in its operation. The North Carolina Supreme Court has recognized the inability of the State to punish for bigamy persons who are parties to a marriage ceremony celebrated outside the State. *State v. Barnett*, 83 N. C. 615. But the conduct which the statute in question prohibits is the cohabitation which takes place within the borders of North Carolina. This statute or ones similar thereto have been considered and held valid by the courts of the following states:

Alabama, *Cox v. State*, 117 Ala. 103, 67 Am. S. R. 166; 41 L. R. A. 760;
California, *People v. Ellis*, 204 Cal. 339, 266 P. 518;
Iowa, *S. v. Stenpper*, 117 Iowa 591, *S. v. Sloan*, 55 *ib.*, 217;
Massachusetts, *Com. v. Bradley*, 2 Cush. 553;
Minnesota, *S. v. Johnson*, 12 Minn. 467, 93 Am. D. 241;
Missouri, *S. v. Stewart*, 194 Mo. 345, 5 Ann. Cas. 963;
North Carolina, *S. v. Moon*, 178 N. C. 715;
Oklahoma, *Ex Parte Gresham*, 53 Okl. Cr. 425, 12 P. (2d) 709;
Tennessee, *Kenneval v. State*, 107 Tenn. 581;
Vermont, *S. v. Palmer*, 18 Vt. 570.

In *People v. Ellis*, *supra*, it is said:

"The power of the Legislature to so protect society against such an immoral act cannot be questioned."

It is true that these decisions are not binding on the United States Supreme Court; however, it is respectfully submitted that such persuasive authorities render any technical Federal

question which may arise of such minor importance as not to be worthy of consideration by this Court.

If the attack upon the validity of the North Carolina statute is to be considered as incidental to the argument that North Carolina was required to recognize the Nevada divorce decrees under the full faith and credit clause, it seems a sufficient answer to say that recognition was not required under *Bell v. Bell*, 181 U. S. 175, and the other authorities cited and discussed.

CONCLUSION

The question set out in the petition are not Federal questions, or if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. Therefore, the writ of *Certiorari* should be denied.

Respectfully submitted.

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Attorney General.

GEORGE B. PATTON,
Assistant Attorney General.

HUGHES J. RHODES,
Assistant Attorney General.
Counsel for the State of North Carolina, Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 84

O. B. WILLIAMS and LILLIE SHAVER HENDRIX,
Petitioners

vs.

THE STATE OF NORTH CAROLINA,
Respondent

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 84

O. B. WILLIAMS and LILLIE SHAVER HENDRIX,
Petitioners

vs.

THE STATE OF NORTH CAROLINA,
Respondent

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT

STATEMENT OF CASE

The petitioners were tried in the Superior Court of Caldwell County, North Carolina, and convicted of bigamous cohabitation, a criminal offense under Section 14-183 of the General Statutes of North Carolina. The conviction was affirmed by the Supreme Court of North Carolina in an opinion filed April 12, 1944, which is reported as STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 224 N. C. 183. A petition for writ of *certiorari* from the United States Supreme Court to the Supreme Court of North Carolina was granted June 12, 1944.

FACTS

The petitioners, O. B. Williams and Lillie Shaver Hendrix, were tried at the February Term, 1941, of the Caldwell County Superior Court and convicted of bigamous cohabitation. They appealed to the Supreme Court of North Carolina where their convictions were sustained. The opinion of the Supreme Court of North Carolina is reported as STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 220 N. C. 445. They then petitioned the United States Supreme Court for a writ of *certiorari*. The writ was granted in 1942, 315 U. S. 795, 86 L. ed. 1196. The United States Supreme Court reversed the convictions of the defendants and remanded the case for further proceedings, 315 U. S. 287, 87 L. ed. 279. The Supreme Court of North Carolina remanded the case to the Superior Court of Caldwell County for a new trial in 1943. STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 222 N. C. 609. The jury again convicted the petitioners, which conviction was affirmed by the Supreme Court of North Carolina in STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 224 N. C. 183.

The statute under which the petitioners were indicted (Section 14-183 of the General Statutes of North Carolina) reads, in part, as follows:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

The evidence for the State showed that the petitioner Williams was married in North Carolina in 1916 to Carrie Wike Williams; that he lived here with his wife until May 7, 1940; that they raised a family of four children; that Tom Hendrix, the husband of petitioner Hendrix, worked for petitioner Williams; that on May 15, 1940, petitioner Williams had left the State of North Carolina and was staying at the Alamo Court, Las Vegas, Nevada; that on June 26, 1940 (exactly six weeks after arrival in Nevada), by publication of summons, he instituted an action for a divorce in Nevada, in which action there was no appearance by his wife, the defendant; that a decree of divorce was granted by a Nevada court on August 26, 1940; that petitioner Williams married petitioner Hendrix in Nevada on October 4, 1940; that in the Fall of 1940 the petitioners returned to North Carolina and lived in Pinola as husband and wife; that petitioner Williams' first wife was still living at the time and had not procured a divorce, but has since died.

The evidence for the State showed further that the petitioner Hendrix was married in North Carolina about 1920 to Tom Hendrix, that she lived in North Carolina with her husband until about May, 1940; that she left the State suddenly and on May 15, 1940, was staying at the same Alamo Court, Las Vegas, Nevada; Tom Hendrix testified that when he went home from his work at petitioner Williams' store at 7:30 o'clock at night "she was gone. They were gone about three months or longer." On June 26, 1940 (exactly six weeks after arrival), she instituted, by publication of summons, a suit for divorce in the State of Nevada, in which there was no appearance by Tom Hendrix, her husband; that a decree of divorce was granted by a Nevada court on October 4, 1940; that on that same day (October 4, 1940) petitioner Hendrix

was married to the petitioner Williams in Las Vegas, Nevada; that the petitioners immediately returned to Pineola, North Carolina, where they lived as husband and wife; that petitioner Hendrix' first husband, Tom Hendrix, was living at the time of this indictment and had not procured a divorce.

The evidence also showed that the petitioners were gone form North Carolina only about three months, and that immediately upon their return they bought a home; that they employed the same attorney—I. S. Thompson, who was a lawyer practicing in Las Vegas, Nevada, and who also acted as Notary Public for both parties, and that the petitioner Williams appeared as a witness for the petitioner Hendrix.

The jury in the trial court, under the instructions of the court in the judge's charge, returned a verdict of guilty as to both defendants.

In the trial of this case in the Superior Court of Caldwell County, the evidence of the case and the contentions of the defendants and the State of North Carolina were fully reviewed in the charge made by the presiding judge. In his charge, Judge Ervin, with care and remarkable precision, fully and definitely instructed the jury as to the law arising on the facts of the case. A study of this charge will completely disclose the legal theory upon which the case was tried, upon which the jury based its verdict.

ARRANGEMENT OF BRIEF

The numerous exceptions relied upon by the defendants on this appeal all fall within four categories and for convenience will be discussed under the following headings:

I. Petitioners' Pleas of Former Jeopardy Were Properly Rejected;

II. The Nevada Divorce Decrees are not Entitled to Full Faith and Credit since the Plaintiffs Therein Acquired no *Bona Fide* Domicile in Nevada, Notwithstanding the Decrees Recite that such *Bona Fide* Domicile was Acquired;

III. The North Carolina Statute under which the Petitioners were Convicted is Constitutional;

IV. The Questions of Policy Posed by Petitioners are Matters which Ought to be Decided by the States.

I

PETITIONERS' PLEAS OF FORMER JEOPARDY WERE PROPERLY REJECTED.

A

The second trial of this case in the Superior Court of Caldwell County involved only one controverted question. Had the defendants, O. B. Williams and Lillie Shaver Hendrix, acquired *bona fide* domiciles or residences *animus manendi* at the time they were granted divorces in Nevada.

The jury returned a verdict of guilty as to both defendants. Under the charge of the court this verdict by the jury was a finding of fact that neither of the defendants, at the time the divorces were granted, was domiciled in Nevada.

The motion to dismiss filed by the defendants and their pleas of former jeopardy are predicated upon the idea that this Court had already decided, on the former hearing, this question favorably to them and is now precluded from further consideration of it.

That such was not the purpose of the Court and that the case was remanded for a new trial is shown by the following excerpts from the opinion of Mr. Justice Douglas:

"The intimation of the majority opinion (220 NC pp. 460-464, 17 SE (2d) 769) that the Nevada divorces were collusive suggests that the second theory on which the state tried the case may have been an alternative ground for the decision below, adequate to sustain the judgment under the rule of Bell v. Bell, 181 US 175, 45 L ed 804, 21 S Ct 551—a case in which this Court held that a decree of divorce was not entitled to full faith and credit when it had been granted on constructive service by the courts of a state in which neither spouse was domiciled. But there are two reasons why we do not reach that issue in this case. In the first place, North Carolina does not seek to sustain the judgment below on that ground. Moreover it admits that there probably is enough evidence in the record to require that petitioners be considered 'to have been actually domiciled in Nevada.' In the second place, the verdict against petitioners was a general one. Hence even though the doctrine of Bell v. Bell, 181 US 175, 45 L ed 804, 21 S Ct 551 *supra*, were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, viz. the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the defendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows here as in Stromberg v. California, 283 US 359, 368, 75 L ed 1117, 1123, 51 S Ct 532, 73 ALR 1484, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. No reason has been suggested why the rule of the Stromberg Case is inapplicable here. Nor has any reason been advanced why the rule of the Stromberg Case is not both appropriate and nec-

essary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights. Accordingly, we cannot avoid meeting the Haddock v. Haddock issue in this case by saying that the petitioners acquired no *bona fide* domicile in Nevada. If the case had been tried and submitted on that issue only, we would have quite a different problem, as Bell v. Bell indicates. We have no occasion to meet that issue now and we intimate no opinion on it. However it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that petitioners' domicile in Nevada was a sham and a fraud. . . .

"But the question for us is a limited one. In the first place, we repeat that in this case we must assume that petitioners had a *bona fide* domicile in Nevada, not that the Nevada domicile was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicile was acquired in Nevada. . . .

"Haddock v. Haddock is overruled. The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion."

In accord with the mandate of this Court, the Supreme Court of North Carolina directed that the case be sent back to the Superior Court of Caldwell County for trial in accordance with the opinion of this Court, STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 222 N. C. 609, in a *per curiam* opinion as follows:

"The judgment heretofore entered in this cause upholding the conviction and judgments entered at the February-March Term, Caldwell Superior Court, reported in 220 N. C. 445, 17 S. E. (2d), 769, will be vacated or set aside, and the cause remanded for a new trial in accordance with the opinion of the Supreme Court of the United States, rendered 21 December, 1942, on *certiorari* to this Court. See O. B. WILLIAMS and LILLIE SHAVER HENDRIX, PETITIONERS, v. STATE OF NORTH CAROLINA, 317 U. S., ..., 87 L. Ed., 189, decided 21 December, 1942. Accordingly, the defendants will recover their costs incurred in the Supreme Court of the United States, and the costs heretofore assessed in this Court will be retaxed."

Following the conviction of the defendants in the second trial in the Superior Court of Caldwell County, these defendants appealed to the Supreme Court of North Carolina and in this Court, in answer to the plea of former jeopardy, Stacy, C. J., comments as follows:

"Even if the jury had found the defendants were domiciled in Nevada, still under the doctrine of Haddock, the divorce decrees, since they were entered on constructive service, might have been, and in fact for this very reason were, held for naught in North Carolina. This, and this alone, is what the court of last resort overruled and 'reversed.' The record did not disclose a finding by the jury that the defendants had actually acquired *bona fide* domiciles in Nevada. Indeed, they

may have found just the reverse. The verdict was a general one and there was evidence to support the State's challenge to the defense on the single ground of defective process or on the dual ground of no *bona fide* domicile and no valid process, albeit the record indicated the latter as the basic cause for sustaining the challenge. The indefiniteness of the record in this respect, however, coupled with an admission which the State regarded as immaterial under the HADDOCK case, *supra*, induced the reversal of the judgment of affirmance. In other words, the legal theory upon which the State chiefly relied to defeat the defense set up by the defendants was disapproved. This did not perforce preclude further challenge to the defense on other grounds. It eliminated the second premise, but it did not work an acquittal of the defendants. An error in respect of the defense set up in a criminal action would not dispose of the indictment. Moreover, the confession was made in the appellate court. Had such admission been made by the solicitor in the trial court and acted upon by the jury, a different situation might have arisen. But that is another matter. 20 Am. Jur., 469. See S. v. BUTLER, 151 N. C., 672, 65 S. E., 993, 25 L. R. A. (N. S.), 169, 19 Ann. Cas., 402. To sustain the conviction and the judgment upholding it, the State was compelled to rely on the principle of the Haddock decision because it was the main theory of the trial. The issue was squarely joined."

It appears to be settled that where a defendant is convicted of a criminal offense and appeals and a new trial is granted, the plea of former conviction or former acquittal is not available to him.

UNITED STATES v. BALL, 163 U. S. 662, 41 L. ed. 300;
MURPHY v. MASSACHUSETTS, 177 U. S. 155, 44 L. ed. 711;

STROUD v. UNITED STATES, 251 U. S. 15, 64 L. ed. 103. Rehearing denied 251 U. S. 380, 64 L. ed. 317;
HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559.

In HILL v. TEXAS, *supra*, the Court says:

"A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements."

In UNITED STATES v. BALL, *supra*, it is said:

"Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted."

On page 19 of petitioners' brief, under the subhead ARGUMENT, petitioners state that on the former hearing in this Court the State admitted that the evidence appearing in the record was sufficient to establish at least colorable *bona fide* residences in the State of Nevada. In our brief in the former hearing, it was said on page 6:

"Although the claim of the petitioners to have been domiciled in Nevada at the time they obtained their divorce decrees appears to be somewhat colorable, there is probably enough evidence in the Record to require that they be considered, *for purposes of this appeal*, to have been actually domiciled in Nevada." (Italics added).

This statement was made because it was considered by the State that HADDOCK v. HADDOCK, 201 U. S. 562, 50 L. ed. 867, was controlling and standing at the threshold of the case was conclusive against the petitioners without consideration of the other question of *bona fides* of the domiciles and, therefore, the question of domicile would not be reached. HADDOCK v. HADDOCK was not at that time questioned by the petitioners and had not been challenged at any stage of the litigation. Overruling HADDOCK v. HADDOCK was probably as unexpected by the petitioners as it was by the State. Furthermore, it was said in the former brief, on page 16:

"Surely no one will contend that respect for the sanctity of the marital relationships is engendered by the unseemly spectacle of married persons, upon sudden or trivial provocation, departing from the state of their domicile, establishing a *fictitious* residence for the sole purpose of getting a divorce, and securing a decree in a state which operates 'divorce mills' as a commercial racket and which is usually so far away as to make it inconvenient for the other spouse to make an appearance."

The statement, therefore, made on page 6 of our former brief has little to do with this hearing.

B

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a state court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by states.

BARRON v. BALTIMORE, 7 Pet. 243;
UNITED STATES v. LANZA, 260 U. S. 377.

The petitioner's brief thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

AMRINE v. TINES (1942; C.C.A. 10), 131 F. (2d) 827.
Compare: PALKO v. CONNECTICUT, 302 U. S. 319;
MAXWELL v. DOW, 176 U. S. 581.

In Amrine v. Tines, *supra*, it is said at page 833:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a state court, the petitioners' pleas of former jeopardy could only have raised questions concerning rights guaranteed them by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the petitioners were not twice placed in jeopardy for the same offense in contravention of the

North Carolina Constitution. Compare WHITE v. TEXAS, 310 U. S. 530. The decision on this point was, therefore, a decision of a state court with respect to a question arising under the constitution of the state. Such a question, the United States Supreme Court cannot review.

CRANE v. CAMPBELL, 245 U. S. 304;
DAVIS v. OHIO, 241 U. S. 565;
GRAHAM v. WEST VIRGINIA, 224 U. S. 616.

II

THE NEVADA DIVORCE DECREES ARE NOT ENTITLED TO FULL FAITH AND CREDIT SINCE THE PLAINTIFFS THEREIN ACQUIRED NO *BONA FIDE* DOMICILE IN NEVADA, EVEN THOUGH THE DECREES RECITE THAT SUCH *BONA FIDE* DOMICILE WAS ACQUIRED.

In order to confer jurisdiction in divorce actions under the law of Nevada, it is necessary for the plaintiff to satisfy the jury that his physical presence in Nevada preceding and including the date of commencement of his action was accompanied by the intent to remain in Nevada permanently, or at least for an indefinite time.

LAMB v. LAMB (Nev., 1937), 63 P. (2d) 872, 875.

Thus, if a plaintiff in a divorce action instituted in Nevada did not have the requisite intent while in Nevada, it would necessarily follow that any divorce procured by him would be a nullity in that State. Being a nullity where rendered, the decree would be a nullity everywhere, at least, in so far as the full faith and credit clause of the Constitution of the United States (Art. IV, Sec. 1) is concerned.

The Nevada divorce decrees interposed by the petitioners as a defense to this criminal prosecution recite that the plain-

tiffs therein are *bona fide* and continuous residents of Nevada and have been such for more than six weeks immediately preceding the commencement of the divorce actions. Are these declarations conclusive? The adjudicated cases compel a negative answer.

In 1874 it was held in THOMPSON v. WHITMAN, 85 U. S. 457, 21 L. ed. 897, that neither the full faith and credit clause of the Constitution of the United States (Art. IV, Sec. 1) nor the Act of Congress passed in pursuance thereof (1 Stat. at L., 122) prevented an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; that the record of a judgment rendered in another state might be contradicted as to the facts necessary to give the court jurisdiction, and, that if it should appear such facts did not exist, the record would be a nullity, notwithstanding a recital in the judgment that such facts did exist.

Twenty-seven years later (1901) Mr. Justice Gray, speaking for the Court in BELL v. BELL, 181 U. S. 175, 45 L. ed. 804, and citing THOMPSON v. WHITMAN, *supra*, said:

"The question in this case is of the validity of the divorce obtained by the husband in Pennsylvania. No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. And by the law of Pennsylvania every petitioner for divorce must have had a *bona fide* residence within the state for one year next before the filing of the petition. Penn. Stats. March 13, 1815, chap. 109, S 2; HOLLISTER v. HOLLISTER, 6 Pa. 449. The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted."

The decision in BELL v. BELL, *supra*, was held to be controlling in the case of STREITWOLF v. STREITWOLF, 181 U. S. 179, 45 L. ed. 807, decided at the same term.

The decisions of the Court in THOMPSON v. WHITMAN, *supra*, BELL v. BELL, *supra*, and STREITWOLF v. STREITWOLF, *supra*, were, in turn, followed and buttressed by the opinion of Mr. Justice White in ANDREWS v. ANDREWS, 188 U. S. 14, 45 L. ed. 366, in the following language:

"It was contended that to permit the jurisdictional facts, which were foreclosed by the judgment, to be re-examined, would be a violation of the due faith and credit clause of the Constitution. This court, however, decided to the contrary, saying:

"'We think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th article of the Constitution, and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.'

"The ground upon which this conclusion was predicated is thus embodied in an excerpt made from the opinion delivered by Mr. Chief Justice Marshall, speaking for the court, in ROSE v. HIMELY, 4 Cranch, 269, 2 L. ed. 617, where it was said:

"'Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced to con-

demn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

In GERMAN SAVINGS & LOAN SOCIETY v. DORMITZER, 192 U. S. 125, 48 L. ed. 373, Mr. Justice Holmes observed:

"It is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. ANDREWS v. ANDREWS, 188 U. S. 14, 39, 47 L. ed. 366, 372, 23 Sup. Ct. Rep. 237, 176 Mass. 92, 93, 57 N. E. 333. An attempt was made to avoid the authority of ANDREWS v. ANDREWS by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed, in strictness, only the attorney disappeared, and the respondent simply ceased to defend the suit. The effect given to the statute of Massachusetts in that case depended wholly on contradicting the record of the divorce suit and proving the want of jurisdiction by proving the libellant's want of domicile in the state."

The sound policy upon which the above decisions are based is very aptly phrased by Mr. Justice Bradley in THOMPSON v. WHITMAN, *supra*, as follows:

"But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the

court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry."

For seventy years the decision quoted from above has stood unchanged, and it would seem that its antiquity and general acceptance would place it in the position of having "settled the law."

Before the decision in WILLIAMS and HENDRIX v. NORTH CAROLINA, *supra*, the doctrine that jurisdiction over the subject matter in divorce cases rests upon domicile, or at least, residence *animus manendi*, of at least one of the parties in the divorce forum and that the full faith and credit clause did not prevent an inquiry in a state other than the divorce forum into the *bona fide* of this domicile or residence *animus manendi*, notwithstanding a recital in the decree or record of the jurisdictional fact of domicile or residence, had been adopted by many states. This doctrine, it appears, had been adopted in the following states by express holding, by dictum or by implication:

Alabama: See JENKINS v. JENKINS, 194 So. 493;
California: WYNNE v. WYNNE, 66 P. (2d) 467;
District of Columbia: SEARS v. SEARS, 92 F (2d) 550;
Georgia: ADAMS v. ADAMS, 13 S. E. (2d) 173;
Illinois: GREIN v. GREIN, 25 N. E. (2d) 409;
Louisiana: STATE v. WENZEL, 171 So. 38;
Maine: USEN v. USEN, 13 A. (2d) 738;

Minnesota: NORRIS v. NORRIS, 273 N. W. 708. (By implication);

Mississippi: See HOPKINS v. HOPKINS, 165 So. 414;

Nebraska: See LIPPINCOTT v. LIPPINCOTT, 3 N. W. (2d) 207;

New Jersey: SPRAGUE v. SPRAGUE, 23 A. (2d) 810;

New Mexico: See GOLDEN v. GOLDEN, 68 P. (2d) 928;

Rhode Island: HOROWITZ v. HOROWITZ, 192 A. 796 (By implication);

Virginia: See DRY v. RICE, 137 S. E. 473.

It is the contention of the State of North Carolina that the United States Supreme Court decisions heretofore cited are in no way affected by the decision of the Court in WILLIAMS and HENDRIX v. NORTH CAROLINA, *supra*. This view has been adopted by *every* state which has had occasion to pass upon the question since the decision in the WILLIAMS case, *supra*.

Alabama: WILKES v. WILKES, 16 So. (2d) 16;

Connecticut: HOOKER v. HOOKER, 32 A. (2d) 68;

Delaware: IN RE AINSCOW'S ESTATE 34 A. (2d) 593;

Iowa: HOBSON v. DEMPSEY CONST. CO., 7 N. W. (2d) 896;

Illinois: BROWN v. HALL, 52 N. E. (2d) 781.
See ATKINS v. ATKINS, 54 N. E. (2d) 488;

Massachusetts: BOWDITCH v. BOWDITCH, 50 N. E. (2d) 65;

New Jersey: WOLFF v. WOLFF, 34 A. (2d), 156.
See MASCOLA v. MASCOLA, 33 A. (2d) 864.

New York: See IN RE HOLMES' ESTATE, 52 N. E. (2d) 424.

See IN RE BINGHAMS' WILL, 39 N. Y. S. (2d) 756.

See McCARTHY v. McCARTHY, 39 N. Y. S. (2d) 922;

Ohio: See SMITH v. SMITH, 50 N. E. (2d) 889;

Pennsylvania: COMMONWEALTH EX REL ESENWEIN v. ESENWEIN, 35 A. (2) 335 (Heard at this term of this Court).

In WILKES v. WILKES, *supra*, the Court says:

"We are not persuaded that the Williams case overturns the rule in Alabama or can be made to support a decree of divorce procured by fictitious averment and proof of jurisdictional facts, often declared a fraud on the court pronouncing the decree. The dignity and sanctity of judicial proceedings may, perhaps, be the better preserved by keeping open the way to prevent the use of the courts as the unwitting instruments of fraud. And is not the proper forum to test such question that forum in which the parties can be personally served and the issues litigated inter partes?"

In HOOKER v. HOOKER, *supra*, Maltbie, C. J., says:

"The plaintiffs claim that the decree of the Nevada court is not open to attack here upon the ground that the court lacked jurisdiction, relying mainly upon the recent decision of the Supreme Court of the United States in Williams v. North Carolina, *supra*. They misconceive the scope of that decision."

In BOWDITCH v. BOWDITCH, *supra*, Dolan, J., observes:

"As we interpret the decision under discussion, we are of opinion that it is still competent for the courts of other states to inquire into the validity of a divorce so far, at least, as its

validity depends upon the jurisdiction of the State where the divorce was granted and that a domicile by one of the parties in the state in which the divorce was granted is essential to jurisdiction. See Williams v. North Carolina, 317 U. S. 287, 297, 298, 63 S. Ct. 207, 87 L.Ed. ..... *That there is nothing in the Williams case contrary to the rule that one who relies upon a foreign divorce must not only plead and prove it, but must also prove his bona fide domicile at the time the divorce relied upon was granted in the foreign State, is the interpretation placed upon the Williams case in cases since decided by a State court* (though not of last resort). See Schnabel v. Schnabel, 179 Misc. 620, 39 N.Y.S. 2d 972; Jiránek v. Jiranek, 179 Misc. 502, 39 N.Y.S. 2d 523; Meyers v. Meyers, 179 Misc. 680, 40 N.Y.S. 2d 444. We are of opinion that there is nothing in the Williams case in conflict with Bell v. Bell, 181 U. S. 175, 21 S.Ct. 551, 45 L. Ed. 804, which holds that at least the petitioner must be genuinely domiciled in the State that granted the divorce." (Italics added).

The position contended for here is not to be confused with the doctrine enunciated in cases in which an appearance is made and the question of the jurisdiction of the court granting the divorce is actively contested. Annotation, 52 A. L. R. 740, DAVIS v. DAVIS, 305 U. S. 32, 83 L. ed. 26. Here there was no appearance by the defendant in the divorce action, either in person, by attorney, or by answer, and the question of the *bona fides* of the petitioners' domicile or residence has not been actively contested. DAVIS v. DAVIS, *supra*, and the cases cited in the annotation to 52 A.L.R. 740, are not, therefore, in point.

The petitioners seek to distinguish BELL v. BELL, *supra*, on the ground that there the evidence showed that Bell was not domiciled in the state granting the divorce decree while

here, they contend, the evidence is not sufficient to show that petitioners were not domiciled in Nevada. This Court has no jurisdiction to review the State Court's finding on this point.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of *certiorari*.

NOBLE v. MITCHELL, 164 U. S. 367, 41 L. ed. 472;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITIES COMMISSION, 309 U. S. 30, 84 L. ed. 563.

In NOBLE v. MITCHELL, *supra*, Mr. Justice White says:

"It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to a jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error."

However, it should be remembered that the divorce decrees here were offered as an affirmative defense to a criminal prosecution. Where a defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the *onus* of proof as to such matters is upon the defendant.

STATE v. CARPENTER, 215 N. C. 635;

See MUGLER v. KANSAS, 123 U. S. 623, 31 L. ed. 205, in which it is said, at page 674:

"Touching the provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the State has proven that the place described is kept and maintained for the maufacture or sale of intoxicating liquors—such manufacture or sale being unlawful except for specified purposes, and then only under a permit—the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the State."

It should also be remembered that the petitioners did not introduce in evidence merely the divorce decree, they went further and introduced parts of the Record in the divorce proceedings. The State of North Carolina was entitled to rely on or to use any of the evidence introduced by the petitioners in the trial below. STATE v. BROWN, 218 N. C. 415.

The trial judge, in accordance with settled local procedure, instructed the jury that the burden of establishing their defenses was on the defendants (petitioners here) that both the evidence of the prosecution and the evidence of the defendants could be considered; and that the recitals in the divorce decrees that the plaintiffs in the divorce actions were *bona fide* residents or domiciliaries of Nevada were *prima facie* evidence of such facts.

These questions being disposed of in accordance with settled local procedure, no question is presented for decision by this Court.

VAN OSTER v. KANSAS, 272 U. S. 465, 71 L. ed. 354;
LIBERTY WAREHOUSE CO. v. BURLEY TOBACCO CO-OP M. ASSOCIATION, 276 U. S. 71, 72 L. ed. 473;
UNITED GAS PUBLIC SERVICE CO. v. TEXAS, 303 U. S. 123, 82 L. ed. 702.

III

THE NORTH CAROLINA STATUTE UNDER WHICH PETITIONERS WERE PROSECUTED IS NOT UNCONSTITUTIONAL.

The petitioners were convicted of bigamous cohabitation in violation of Section 14-183 of the General Statutes of North Carolina, the pertinent provision of which reads as follows:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . . "

If the attack upon the validity of the North Carolina statute is to be considered as incidental to the argument that North Carolina was required to recognize the Nevada divorce decrees under the full faith and credit clause, it seems a sufficient answer to say that recognition was not required under BELL v. BELL, 181 U. S. 175, 45 L. ed. 804, and the other authorities cited and discussed.

It can hardly be questioned that the police power of a state is sufficiently broad to allow the enactment of legislation designed for the protection of a relationship so intimately

connected with the public health, safety and morality as the marital relationship. It can hardly be questioned that a state validly can enact laws providing for the punishment of those who, without being legally married according to the laws of the state, live and cohabit together as man and wife. Such is the purpose of the provision of Section 14-183 of the General Statutes of North Carolina now under consideration.

The statute is not, as contended by the petitioners, extra-territorial in its operation. The North Carolina Supreme Court has recognized the inability of the State to punish for bigamy persons who are parties to a marriage ceremony celebrated outside the State. STATE v. BARNETT, 83 N. C. 615. But the conduct which the statute in question prohibits is the cohabitation which takes place within the borders of North Carolina. The Supreme Court of North Carolina held this statute constitutional in STATE v. MOON, 178 N. C. 715, 100 S. E. 615. In writing the opinion, Justice Brown stated:

"It is further contended that the amendment of 1913 is unconstitutional inasmuch as its effect is to punish the defendant for a crime committed outside of the territorial limits of the State. This contention cannot be sustained. It is an offense committed in North Carolina called bigamous cohabitation. Similar statutes have been enacted in the States of Alabama, Iowa, Massachusetts, Minnesota, Missouri, Tennessee, and Vermont, and in each of these states they have been sustained.

"In Alabama, COX v. STATE, 117 Ala. 103, 67 Am. S. R. 166, 44 L. R. A. 760.

"In Iowa, S. v. STEUPPER, 117 Iowa 591, S. v. SLOAN, 55 *ib.*, 217.

"In Massachusetts, COM. v. BRADLEY, 2 Cush. 553.

"In Minnesota, S. v. JOHNSON, 12 Minn. 467, 93 Am.D. 241.
"In Missouri, S. v. STEWART, 194 Mo. 345, 5 Ann. Cas. 963.
"In Tennessee, KENNEVAL v. STATE, 107 Tenn. 581
"In Vermont, S. v. PALMER, 18 Vt. 570."
To the same effect:
PEOPLE v. ELLIS (California), 266 P. 518;
EX PARTE GRESHAM (Oklahoma), 12 P. (2d) 709.
In PEOPLE v. ELLIS, *supra*, it is said:

"The power of the Legislature to so protect society against such an immoral act cannot be questioned."

In so far as the defendants' claim that the statute is unconstitutional relates to the Fourteenth Amendment, it should be remembered that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requisite is satisfied. Due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of right and distributive justice. CALDWELL v. TEXAS, 137 U. S. 697, 34 L. ed. 816.

The State is traditionally the protector of the lives, liberties and property of its own people and the courts of North Carolina have always been vigilant in upholding "due process of law," which means such an exertion of power of government as settled maxims of law sanction and under such safeguards for protection of individual rights as those maxims prescribe.

IV

THE QUESTIONS OF POLICY POSED BY THE PETITIONERS ARE MATTERS WHICH OUGHT TO BE DECIDED BY THE STATES.

The petitioners argue at considerable length that the judgment of the Supreme Court of North Carolina ought to be reversed because it is bad social policy for recognition to be denied to foreign divorce decrees. It is contended that havoc will be created "among literally thousands of married couples throughout the United States" if it is held that the Nevada divorce decrees in question are not entitled to full faith and credit. Let us not forget that the question before this Court is not whether state courts *should* recognize divorce decrees of the type under consideration, but whether the full faith and credit clause of the Federal Constitution *compels* them to so so.

Whatever havoc and consternation might arise among married couples if the judgment of the Supreme Court of North Carolina should be affirmed would be the direct result of disregard for the law as it has been declared by our courts for many years. It will be no innovation to hold that a divorce granted in a state where neither spouse is domiciled and in which the defendant is not personally served and makes no appearance is not entitled to full faith and credit.

If the decision of this case involves matters of policy, it is to be remembered that there are arguments based on policy which may be appropriately advanced by both sides. The dissolution of the bonds of matrimony is a serious matter. Surely no one will contend that respect for the sanctity of the marital relationships is engendered by the unseemly spectacle of married persons, upon sudden or trivial provocation, departing from the state of their domicile, establishing a fictitious residence for the sole purpose of getting a divorce, and securing a decree in a state which operates "divorce

mills" as a commercial racket and which is usually so far away as to make it inconvenient for the other spouse to make an appearance. Who can say whether the greater wisdom is in the policy of protecting the marital status of those who have relied on foreign divorces or in the policy of compelling respect for the seriousness of marriage and discouraging its hasty dissolution through non-recognition of *ex parte* migratory divorces, such as those under consideration?

While the full faith and credit clause does not apply to divorce decrees rendered by the courts of a foreign country, the following quotation from Senor Vincente Estrada Cajigal, at the time the Governor of the State of Morelos, shows clearly how "divorce mills" are generally regarded.

"'I have been studying the situation at Reno, and I admit that we need some improvement here in Morelos. We intend to improve our present divorce procedures in many ways, several of which will appeal to our customers. I say customers, for I consider the divorce industry purely in the light of a commercial transaction, as an operation in buying and selling. We have a law to sell and it is our responsibility to render purchase as easy and rapid for customers as possible. In our calculations we are eliminating all consideration of months or even weeks and plan to work out a schedule on a basis of days, and as few of them as may be imaginable. *We are aiming at a maximum of ten days. If Reno meets that, we shall cut the time still lower.*'" 17 Minnesota Law Review, 638, at pages 643, 644.

It is assumed by the State of North Carolina that these matters of policy are questions which will be left to the courts and legislatures of the various states and that the Supreme

Court of the United States will concern itself only with the proper interpretation of the full faith and credit clause.

Respectfully submitted,

HARRY MCMULLAN,
Attorney General

HUGHES J. RHODES,
Assistant Attorney General

J. E. TUCKER,
Counsel for State of North Carolina, Respondent.

PETITION FOR REHEARING

Supreme Court, U. S.
FILED
JUN 14 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR REHEARING

W. H. STRICKLAND,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the petitioners, O. B. Williams and Lillie Shaver Hendrix, through their counsel of record, and petition the Court that they be granted a re-hearing of the decision rendered in the above entitled cause of action on May 21, 1945, and would respectfully show unto the Court the following.

1

That your petitioners presented, for determination, the constitutionality of Section 14-183 of the General Statutes of North Carolina under which your petitioners were indicted; that the Court did not pass upon the constitutionality of said Statute and that your petitioners verily believe

that they are entitled to have the constitutionality of said Statute determined.

2

That your petitioners desire a re-hearing of this cause for the reason that the opinion rendered on May 21, 1945, leaves the problem involved in a state of speculation and conjecture for the following reasons, to-wit: the decision in *Williams* v. *North Carolina*, 317 U. S. 287, specifically overruled *Haddock* v. *Haddock*, while the opinion rendered May 21, 1945, does not overrule the prior decision in the identical question reported 317 U. S. 287, nor does it purport to re-establish *Haddock* v. *Haddock*. Thus there are two contrary decisions in the identical case and on the identical facts, involving the identical subject matter and the identical parties. Neither the legal profession nor the layman can, under these circumstances, determine what is the law. *Bell* v. *Bell*, 181 U. S. 175, is not applicable to the case at bar for the reason that there the matter involved was a civil right, whereas in the case at bar the question involved is a matter of criminal prosecution and involves the liberty of your petitioners. Moreover, in *Bell* v. *Bell*, the burden of challenging the divorce decree was cast upon the party attacking the divorce decree, whereas in the case at bar the burden has been cast upon your petitioners to prove their innocence, notwithstanding the fact that the law of the land presumes every person to be innocent in a criminal prosecution until the state has proven such person guilty beyond a reasonable doubt. In the case at bar, the trial court, the Supreme Court of North Carolina; and now this Court has inferred that the residence of your petitioners in Nevada was a sham and a fraud, notwithstanding the fact that the Nevada courts received evidence upon the question of the good faith of your petitioners' residence in the State of Nevada and determined, as a matter of fact,

that your petitioners were bona fide residents in the State of Nevada, while the State of North Carolina was not required to produce any evidence challenging that adjudication of the question of fact, thus casting the burden upon your petitioners to prove their innocence.

3

The opinion sought to be re-heard involves a misapplication of the provisions of the full faith and credit clause of the Constitution of the United States and the Act of Congress adopted pursuant thereto, for the reason that divorce decrees are not excluded from the provisions of either the full faith and credit clause or the Act of Congress.

4

The sovereign state should be as equally bound by its admissions as are individuals. In the hearing of this cause when it was first before the Court, the sovereign State of North Carolina admitted that there was sufficient evidence in the record to establish at least a colorable bona fide domicile in the State of Nevada. On the second hearing, North Carolina retracted that admission, but offered no evidence challenging the bona fides of the Nevada domicile of your petitioners. The sovereign State of North Carolina should not be permitted to "take two bites at the same cherry." That is the effect of the two opinions in this cause.

5

The present opinion, filed May 21, 1945, leaves the question of marriage and divorce in the realm of uncertainty. In the light of the two decisions in the identical case, it is impossible for counsel to advise clients with any degree of certainty as to when they may be able to procure a valid

and legal decree dissolving the bonds of matrimony. In the interest of the national public good this situation should be clarified.

6

The reasoning of the majority opinion does not support the conclusion and result reached by the Court, for example, "'The Constitution did not mean to confer (upon the States) a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'" In short, the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of "comity".'" The evidence in this record shows that your petitioners were residents of Nevada at the time of the rendition of the divorce decrees, and had complied with the respective requirements at the time of the rendition of the divorce decrees. The State of North Carolina offered no evidence that the petitioners were not residents of Nevada fully in accordance with Nevada laws at the time of the rendition of the decrees, but that the State of North Carolina only inferred, in the absence of evidence, that the petitioners were not residents of the State of Nevada.

Then again it is stated in the majority opinion, "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.'"

The net result of the majority opinion is a denial of the right of Nevada to render a binding decree for people who have met the residence requirements of said State.

Then again, the majority opinion states, "The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted."

Yet the majority opinion denies Nevada that right and at the same time imposes upon the State of Nevada the bigamous cohabitation statute under which these petitioners were indicted, irrespective of the fact that they had met the residence requirements of the State of Nevada. Residence and domicile is a matter of intention and the only evidence of intention on the part of the petitioners offered either by the State or the petitioners was the testimony before the Nevada court and the finding of fact by the Nevada court that the petitioners were bona fide residents of said State.

Then again, the majority opinion states, "Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises."

Yet the majority opinion denies the courts of the State of Nevada to exercise these self-same principles. Under the ruling of the court, it would be necessary for every divorced person to relitigate the good faith of their residence in the divorcing state in every state of the union whereby they might perchance sojourn. This creates an intolerable situation with respect to the marriage and divorce laws. In addition thereto, the majority opinion places North Carolina in a situation of being permitted to reject one part of the transaction in Nevada and accept the other part of the transaction, that is, it permits North Carolina to reject the divorce decree granted by the State of Nevada and at the same time accept the validity of the marriage contract made between the petitioners in the State of Nevada. This conclusion is inevitable for the reason that unless North Carolina accepts the marriage entered

into in the State of Nevada, then the petitioners could not be guilty of anything more than plain, ordinary adultery. If North Carolina accepts one part of the transaction, it should be required to accept the other part of the transaction. Under North Carolina's loose construction of the statute involved, the said statute may apply equally as well to citizens who have never lived in North Carolina prior to the taking up of a new residence in North Carolina and indictment for bigamous cohabitation.

Then again the majority opinion states, "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties."

This statement seems to indicate that in order for a divorce decree to be binding, the other forty-seven states in their sovereign capacity must be made party defendants to every divorce action instituted and prosecuted to a conclusion. The American people are a transient people and they move freely from one state to another, and it would be ridiculous for party litigants to a divorce action to relitigate the bona fides of their residence in every state in which they might chance to sojourn, or to make every state party to a divorce action. In fact, such a situation is impossible for the reasons that individuals are not permitted to sue the state. Likewise, it is not a sound proposition of law to hold that no state is bound by a decree of divorce when service of process has been had in accordance with the laws of the respective state and in accordance with due process, for the reason that such a holding would undermine every single divorce decree granted in any of the courts of the United States where service was had by publication.

Then again, the majority opinion holds on page 4, "On the contrary, it is open to the courts of any State in the

trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased."

In the case at bar, no evidence was introduced by the State of North Carolina, which was the attacking party, to the effect that the petitioners had not established a domicile in the State of Nevada, but only inferred as much.

It is to be observed that there was no issue of fraud upon the jurisdiction of the State of Nevada and therein the majority opinion is faulty in assuming fraud upon the jurisdiction of the Nevada courts.

Then again, on page 5 of the majority opinion it is stated, "All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question."

Yet the conclusion of the majority opinion repudiates this very principle of law.

Then again the majority opinion states, "What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant."

The conclusion of the majority opinion is exactly the opposite from this principle of law. Since the State of North Carolina offered no evidence challenging the bona fide residence of the petitioners in Nevada but, on the contrary, in the absence of evidence as will be hereinafter pointed

out, inferred and concluded that the petitioners had established no bona fide residence in the State of Nevada but "inferred" that the residence was not bona fide.

If this decision is permitted to stand, then the State of North Carolina or any other of the forty-seven states may infer and "conclude" without the production of any evidence, that any kind of a judgment of a sister state is void for the lack of a bona fide domicile or void for lack of jurisdiction.

Courts cannot make findings of fact in the absence of evidence. If we are to permit such procedure, then life in the United States will be no different from that existing in the now crushed Germany under the Hitler regime. If no respect be given to the judicial proceedings of the courts of any state of the union, then there is little hope for the freedom of the American people and little hope for the civil rights of the American people under the mandate of the Constitution.

Then again on page 9, the majority opinion says, "And so we cannot say that North Carolina was not entitled to *draw the inference that petitioners* never abandoned their domiciles in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court."

This ruling inaugurates a new and unsound principle of law since it permits the State, in a criminal prosecution, to infer and conclude in the absence of evidence that the defendants (petitioners here) are guilty and, casts upon the defendants (petitioners here) the burden of proving their innocence.

Then referring to the concurring opinion of Mr. Justice Murphy on page 1 of the opinion, the following is adopted as the correct principle of law.

"The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders."

"But if Nevada's divorce decrees are to be accorded full faith and credit in the courts of her sister states it is essential that Nevada have proper jurisdiction over the divorce proceedings. This means that at least one of the parties to each ex parte proceeding must have a bona fide domicil within Nevada for whatever length of time Nevada may prescribe."

Obviously, the ultimate conclusion of the majority opinion is contrary to this principle of law and should be clarified.

8

Then again Mr. Justice Murphy states, "This means, in other words, that the jury found that the petitioners' residence in Nevada for six weeks was not accompanied by a bona fide intention to make Nevada their home and to remain there permanently or at least for an indefinite time, as required even by Nevada law."

And this was done, notwithstanding the fact that the Nevada Courts concluded exactly the opposite on competent evidence before it, whereas North Carolina offered no evidence challenging the good faith of their residence in Nevada but "concluded" that there was no bona fide residence.

Does this opinion mean that the courts of the land are abandoning the fundamental principle of law that every person charged with crime is presumed to be innocent until proven guilty beyond a reasonable doubt? Apparently that is what the majority opinion holds. A careful analysis will

permit of no other conclusion. It now appears to be that at least under this opinion persons who have been divorced and contracted a marriage in another state are presumed to be guilty of bigamous cohabitation if they perchance move to some other state.

It is to be observed that contrary to the mention of six weeks' residence, these petitioners remained in Nevada for a period of more than five months.

Then again on page 3 of Mr. Justice Murphy's opinion, it is stated, (a) those effective solely within the borders of Nevada and (b) those effective everywhere on the ground that at least one of the parties had a bona fide domicil in the state at the time the decree was granted. Neither type of divorce is involved here. And Nevada has no interest that we can respect in issuing divorce decrees with extraterritorial effect to those who are domiciled elsewhere and who secure sham domicils in Nevada solely for divorce purposes."

The record does not dispute the fact that the petitioners were in Nevada and that they had acquired a residence there fully in accord with the Nevada statutes and pursuant thereto, Nevada dissolved the bonds of matrimony and ratified a marriage contract between the petitioners, which admittedly is valid in Nevada.

Who shall determine the persons who are legal residents of Nevada, the State of Nevada or the State of North Carolina?

If North Carolina be permitted to determine by its own tribunals when persons are legal residents of any other state in the union, then no judgment is secure and the effect of the majority opinion will serve only to confuse every field

of litigation and result in strife, turmoil, confusion and uncertainty among the legal profession as well as litigants.

On page 4 of Mr. Justice Murphy's concurring opinion, reference is made to *State* v. *Herron*, 175 N. C. 754. A careful examination of that opinion will show that the burden was cast upon the State to prove that the defendant had not established a bona fide residence in the State of Georgia. The State carried the burden in that case by showing that the defendant, immediately after instituting his divorce action in Georgia, returned to the City of Asheville, North Carolina and there conducted his business in the usual manner until the time his Georgia divorce action was called for trial. The same principle was applied in *Bell* v. *Bell*, *supra*, but that principle has been denied these petitioners in the present action and the new principle now proposed to be adopted is unjust and contrary to the fundamental laws of the land in that it places upon the defendants (petitioners here) the burden of proving their innocence.

After diligent search, your petitioners have been unable to find any legal precedent in the judicial history of this country supporting such a proposition.

Wherefore, it is respectfully prayed that a re-hearing be granted to the end in view that your petitioners may receive justice in accordance with the long established principles of the fundamental law of the land.

W. H. Stickland,
Attorney for Petitioners.

Certificate

I, W. H. Strickland, counsel of record for the above named petitioners, do hereby certify that the foregoing petition for re-hearing is filed in good faith and for what I

believe to be a meritorious cause and that the same is not filed for the purpose of delay or procrastination.

This the 9th day of June, 1945.

W. H. STICKLAND.

Sworn and subscribed to before me this the 9th day of June, 1945.

DOROTHY TATE,
Notary Public.

My commission expires February 5, 1946.

(8724)

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review judgments of the Supreme Court of North Carolina, affirming convictions for bigamous cohabitation,[1] assailed on the ground that full faith and credit, as required by the Constitution of the United States, was not accorded divorces decreed by one of the courts of Nevada. *Williams* v. *North Carolina*, 317 U. S. 287, decided an earlier aspect of the controversy. It was there held that a divorce granted by Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where Nevada's finding of domicil was not questioned, though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina. The record then before us did not present the question whether North Carolina had the power "to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada." *Williams* v. *North Carolina*, *supra* at 302. This is the precise issue which has emerged after retrial of the cause following our reversal. Its obvious importance brought the case here. 322 U. S. 725.

The implications of the Full Faith and Credit Clause, Article IV, Section 1 of the Constitution,[2] first received the sharp analysis

[1] The prosecution was under § 14-183 of the General Statutes of North Carolina (1943): "If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . . ."

[2] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

of this Court in *Thompson* v. *Whitman*, 18 Wall. 457. Theretofore, uncritical notions about the scope of that Clause had been expressed in the early case of *Mills* v. *Duryee*, 7 Cranch 481. The "doctrine" of that case, as restated in another early case, was that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced". *Hampton* v. *M'Connel*, 3 Wheat. 234, 235. This utterance, when put to the test, as it was in *Thompson* v. *Whitman*, *supra*, was found to be too loose. *Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operation only when, in the language of Kent, "the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person". Only then is "the record of the judgment . . . entitled to full faith and credit". 1 Kent, Commentaries (2d ed., 1832) * 261 n. b. The essence of the matter was thus put in what *Thompson* v. *Whitman* adopted from Story: "'The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'"[3] 18 Wall. 457, 462. In short, the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of "comity".[4]

But the Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447-48.[5] "To give it the force of a judgment in another state, it must be made a judgment there". *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 325. It can be made a judgment there only if the court purporting to render the original judgment had

[3] It is interesting to note that this more critical analysis by Mr. Justice Story of the nature of the Full Faith and Credit Clause first appeared in 1833, twenty years after his loose characterization in Mills v. Duryee, *supra*. 3 Story, Commentaries on the Constitution (1st ed., 1833) p. 183.

[4] "There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation." James C. Carter and Elihu Root, Appellants' brief, p. 49, in Hilton v. Guyot, 159 U. S. 113. See, as to "comity", Loucks v. Standard Oil Co., 224 N. Y. 99.

[5] The reach of Congressional power given by Art. IV, § 1 is not before us. See Jackson, Full Faith and Credit—the Lawyer's Clause of the Constitution (1945) 45 Col. L. Rev. 1, 21-24; Cook, Logical and Legal Bases of Conflict of Laws (1942) 98 *et seq.*

power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.

"It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction". It was "too late" more than forty years ago. *German Savings Society* v. *Dormitzer*, 192 U. S. 125, 128.

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell* v. *Bell*, 181 U. S. 175; *Andrews* v. *Andrews*, 188 U. S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina*, *supra*, the jurisdictional requirement of domicil is freed from confusing refinements about "matrimonial domicil", see *Davis* v. *Davis*, 305 U. S. 32, 41, and the like. Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. *Forsyth* v. *Hammond*, 166 U. S. 506, 517; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 30; *Davis* v. *Davis*, *supra*. But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the

record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.[6]

These considerations of policy are equally applicable whether power was assumed by the court of the first State or claimed after inquiry. This may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system.[7] See *Worcester County Co.* v. *Riley*, 302 U. S. 292; *Texas* v. *Florida*, 306 U. S. 398; *Dist. of Columbia* v. *Murphy*, 314 U. S. 441. What was said in *Worcester County Co.* v. *Riley, supra*, is pertinent here, "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries." 302 U. S. 292, 299. If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicil is the foundation of probate jurisdiction precisely as it is that of divorce. The ruling in *Tilt* v. *Kelsey*, 207 U. S. 43, regarding the probate of a will, is equally applicable to a sister-State divorce decree: "the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased." 207 U. S. 43, 53.

Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as

[6] We have not here a situation where a State disregards the adjudication of another State on the issue of domicil squarely litigated in a truly adversary proceeding.

[7] Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution of the United States, the proper criteria for ascertaining domicil, should these be in dispute, become matters for federal determination. See Hinderlider v. La Plata Co., 304 U. S. 92, 110.

was recently pointed out, to label divorce proceedings as actions *in rem*." *Williams* v. *North Carolina, supra* at 297. But insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is party to a proceeding *in rem*. See *Brigham* v. *Fayerweather*, 140 Mass. 411, 413, quoted in *Tilt* v. *Kelsey, supra* at 52. All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable.

But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicil within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State.

The problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudications with due regard for another most important aspect of our federalism, whereby "the domestic relations of husband and wife . . . were matters reserved to the states," *Popovici* v. *Agler*, 280 U. S. 379, 383-84, and do not belong to the United States. *In re Burrus*, 136 U. S. 586, 593-94. The rights that belong to all the States and the obligations which membership in the Union imposes upon all, are made effective because this Court is open to consider claims, such as this case presents, that the courts of one State have not given the full faith and credit to the judgment of a sister State that is required by Art. IV, § 1 of the Constitution.

But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil. "It is not for us to retry the facts", as was held in a case in which, like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil. *Burbank* v. *Ernst*, 232 U. S. 162, 164. The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment.

What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose reexamination by another State. Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. *Thompson* v. *Whitman*, *supra*. If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we can not upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding

that it had jurisdiction. If it is a matter turning on local law, great deference is owed by the courts of one State to what a court of another State has done. See *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346. But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record.

When this case was first here, North Carolina did not challenge the finding of the Nevada court that petitioners had acquired domicils in Nevada. For her challenge of the Nevada decrees, North Carolina rested on *Haddock* v. *Haddock*, 201 U. S. 562. Upon retrial, however, the existence of domicil in Nevada became the decisive issue. The judgments of conviction now under review bring before us a record which may be fairly summarized by saying that the petitioners left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so and married one another they left Nevada and returned to North Carolina to live there together as man and wife. Against the charge of bigamous cohabitation under § 14-183 of the North Carolina General Statutes, petitioners stood on their Nevada divorces and offered exemplified copies of the Nevada proceedings.[8] The trial judge charged that the State had the burden of proving beyond a reasonable doubt that (1) each petitioner was lawfully married to one person; (2) thereafter each petitioner contracted a second marriage with another person outside North Carolina; (3) the spouses of petitioners were living at the time of this second marriage; (4) petitioners cohabited with one another in North Carolina after the second marriage. The burden, it was charged, then devolved upon petitioners "to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy" the jury from all the evidence, that petitioners were domiciled in Nevada at the time they obtained their divorces. The court further charged that "the recitation" of

[8] As to petitioner Hendrix these included the pleadings, evidence and decree. As to petitioner Williams essentially the same evidence with respect to his domicil is in the record from witnesses in this case. It shows when Williams left North Carolina, when he arrived in Nevada, the prompt filing of his divorce suit (Nevada requires six weeks' residence prior to filing a suit for divorce), marriage to petitioner Hendrix immediately after petitioners were divorced, and his prompt return to North Carolina. All of this bears on abandonment of the North Carolina domicil and the intent to remain indefinitely elsewhere.

bona fide domicil in the Nevada decree was "prima facie evidence" sufficient to warrant a finding of domicil in Nevada but not compelling "such an inference". If the jury found, as they were told, that petitioners had domicils in North Carolina and went to Nevada "simply and solely for the purpose of obtaining" divorces, intending to return to North Carolina on obtaining them, they never lost their North Carolina domicils nor acquired new domicils in Nevada. Domicil, the jury was instructed, was that place where a person "has voluntarily fixed his abode . . . 'not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time."

The scales of justice must not be unfairly weighted by a State when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.

State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. *Norris* v. *Alabama*, 294 U. S. 587, 590. This record is barren of such attempted evasion. What it shows is that petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live. It cannot reasonably be claimed that one set of inferences rather than another regarding the acquisition by petitioners of new domicils in Nevada could not be drawn from the circumstances attending their Nevada divorces. It would be highly unreasonable to assert that a jury could not reasonably find that the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina. Such an intention, the trial court properly charged, would preclude acquisition of domicils in Nevada. See *Williamson* v. *Osenton*,

232 U. S. 619. And so we can not say that North Carolina was not entitled to draw the inference that petitioners never abandoned their domicils in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court.

If a State cannot foreclose, on review here, all the other States by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional disregard by any one State of the reciprocal obligations of the forty-eight States to respect the constitutional power of each to deal with domestic relations of those domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights. Relevant statistics happily do not justify lurid forebodings that parents without number will disregard the fate of their offspring by being unmindful of the status of dignity to which they are entitled. But, in any event, to the extent that some one State may, for considerations of its own, improperly intrude into domestic relations subject to the authority of the other States, it suffices to suggest that any such indifference by a State to the bond of the Union should be discouraged not encouraged.

In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada. Since the divorces which they sought and received in Nevada had no legal validity in North Carolina and their North Carolina spouses were still alive, they subjected themselves to prosecution for bigamous cohabitation under North Carolina law. The legitimate finding of the North Carolina Supreme Court that the petitioners were not in truth domiciled in Nevada was not a contingency against which the

petitioners were protected by anything in the Constitution of the United States. A man's fate often depends, as for instance in the enforcement of the Sherman Law, on far greater risks that he will estimate "rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash* v. *United States*, 229 U. S. 373, 377. The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled. In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that "he who shall do them shall do them at his peril and will not be heard to plead in defence good faith or ignorance." *United States* v. *Balint*, 258 U. S. 250, 252, quoting *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69-70. Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime.

We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations. And, as was said in connection with another aspect of the Full Faith and Credit Clause, our conclusion "is not a matter to arouse the susceptibilities of the States, all of which are equally concerned in the question and equally on both sides." *Fauntleroy* v. *Lum*, 210 U. S. 230, 238.

As for the suggestion that *Williams* v. *North Carolina*, *supra*, foreclosed the Supreme Court of North Carolina from ordering a second trial upon the issue of domicil, it suffices to refer to our opinion in the earlier case.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Murphy, concurring.

While I join in the opinion of the Court, certain considerations compel me to state more fully my views on the important issues presented by this case.

The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders.

But if Nevada's divorce decrees are to be accorded full faith and credit in the courts of her sister states it is essential that Nevada have proper jurisdiction over the divorce proceedings. This means that at least one of the parties to each ex parte proceeding must have a bona fide domicil within Nevada for whatever length of time Nevada may prescribe.

This elementary principle has been reiterated by this Court many times. In *Bell* v. *Bell*, 181 U. S. 175, this Court held that "because neither party had a domicil in Pennsylvania" the Pennsylvania court had no jurisdiction to grant a divorce and its decree "was entitled to no faith and credit in New York or in any other state." The same rule was applied in the companion case of *Streitwolf* v. *Streitwolf*, 181 U. S. 179. Referring to these two prior cases as holding that "domicil was in any event the inherent element upon which the jurisdiction must rest," the Court in *Andrews* v. *Andrews*, 188 U. S. 14, repeated that bona fide domicil in a state is "essential to give jurisdiction to the courts of such state to render a decree of divorce which would have extraterritorial effect." The *Andrews* case made it clear,

moreover, that this requirement of domicil is not merely a matter of state law. It was stated specifically that "without reference to the statute of South Dakota and in any event" domicil in South Dakota was necessary. 188 U. S. at 41. All of the opinions in *Haddock* v. *Haddock*, 201 U. S. 562, recognized this principle, with Mr. Justice Brown's dissenting opinion stating that "the courts of one state may not grant a divorce against an absent defendant to any person who has not acquired a bona fide domicil in that state." Finally, in *Williams* v. *North Carolina*, 317 U. S. 287, the Court acknowledged that the plaintiff's domicil in a state "is recognized in the *Haddock* case and elsewhere (Beale, Conflict of Laws, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance." See also *Atherton* v. *Atherton*, 181 U. S. 155.

The jury has here found that the petitioner's alleged domicil in Nevada was not a bona fide one, which in common and legal parlance means that it was acquired fraudulently, deceitfully or in bad faith. This means, in other words, that the jury found that the petitioners' residence in Nevada for six weeks was not accompanied by a bona fide intention to make Nevada their home and to remain there permanently or at least for an indefinite time, as required even by Nevada law. *Lamb* v. *Lamb*, 57 Nev. 421, 430. This conclusion is supported by overwhelming evidence satisfying whatever standard of proof may be propounded. Under these circumstances there is no reason to doubt the efficacy of jury trials in relation to the question of domicil or to speculate as to whether another jury might have reached a different verdict on the same set of facts.

Thus the court below properly concluded that Nevada was without jurisdiction so as to give extraterritorial validity to the divorce decrees and that North Carolina was not compelled by the Constitution to give full faith and credit to the Nevada decrees. North Carolina was free to consider the original marriages still in effect, the Nevada divorces to be invalid, and the Nevada marriage to be bigamous, thus giving the Nevada marriage the same force and effect that Nevada presumably would have given it had Nevada considered the original marriages still outstanding. Cf. *State* v. *Zichfeld*, 23 Nev. 304.

By being domiciled and living in North Carolina, petitioners secured all the benefits and advantages of its government and participated in its social and economic life. As long as petitioners and their respective spouses lived there and retained that domicil, North Carolina had the exclusive right to regulate the dissolution of their marriage relationships. However harsh and unjust North Carolina's divorce laws may be thought to be, petitioners were bound to obey them while retaining residential and domiciliary ties in that state.

No justifiable purpose is served by imparting constitutional sanctity to the efforts of petitioners to establish a false and fictitious domicil in Nevada. Such a result would only tend to promote wholesale disregard of North Carolina's divorce laws by its citizens, thus putting an end to "the existence of all efficacious power on the subject of divorce." *Andrews* v. *Andrews; supra,* 32. Certainly no policy of Nevada dictates lending the full faith and credit clause to protect actions grounded in deceit. Nevada has a recognizable interest in granting only two types of ex parte divorces: (a) those effective solely within the borders of Nevada, and (b) those effective everywhere on the ground that at least one of the parties had a bona fide domicil in the state at the time the decree was granted. Neither type of divorce is involved here. And Nevada has no interest that we can respect in issuing divorce decrees with extraterritorial effect to those who are domiciled elsewhere and who secure sham domicils in Nevada solely for divorce purposes.

There are no startling or dangerous implications in the judgment reached by the Court in this case. All of the uncontested divorces that have ever been granted in the forty-eight states are as secure today as they were yesterday or as they were before our previous decision in this case. Those based upon fraudulent domicils are now and always have been subject to later reexamination with possible serious consequences.

Whatever embarrassment or inconvenience resulting to those who have made property settlements, contracted new marriages or otherwise acted in reliance upon divorce decrees obtained under conditions found to exist in this case is not insurmountable. The states have adequate power, if they desire to exercise it, to enact legislation providing for means of validating any such property settlements or marriages or of relieving persons from other unfortunate consequences.

Nor are any issues of civil liberties at stake here. It is unfortunate that the petitioners must be imprisoned for acts which they probably committed in reliance upon advice of counsel and without intent to violate the North Carolina statute. But there are many instances of punishment for acts whose criminality was unsuspected at the time of their occurrence. Indeed, for nearly three-quarters of a century or more individuals have been punished under bigamy statutes for doing exactly what petitioners have done. *People* v. *Dawell*, 25 Mich. 247; *State* v. *Armington*, 25 Minn. 29; *People* v. *Baker*, 76 N. Y. 78; *State* v. *Westmoreland*, 76 S. C. 145. Petitioners especially must be deemed to have been aware of the possible criminal consequences of their actions in view of the previously settled North Carolina law on the matter. *State* v. *Herron*, 175 N. C. 754. This case, then, adds no new uncertainty and comes as no surprise for those who act fraudulently in establishing a domicil and who disregard the laws of their true domiciliary states.

As Mr. Justice Holmes said in his dissenting opinion in the *Haddock* case, 201 U. S. at 628, "I do not suppose civilization will come to an end whichever way this case is decided." Difficult problems inevitably arise from the fact that people move about freely among the forty-eight states, each of which has its own policies and laws. Until the federal government is empowered by the Constitution to deal uniformly with the divorce problem or until uniform state laws are adopted, it is essential that definite lines of demarcation be made as regards the scope and extent of the varying state practices. See 91 Cong. Rec. 4238-4241 (May 3, 1945). This case illustrates the drawing of one such line, a line that has been drawn many times before without too unfortunate dislocations resulting among those citizens of a divorced status. There is no reason to believe that any different or more serious consequences will result from retracing that line today.

THE CHIEF JUSTICE and MR. Justice JACKSON join in these views.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Rutledge, dissenting.

Once again the ghost of "unitary domicil" returns on its perpetual round, in the guise of "jurisdictional fact," to upset judgments, marriages, divorces, undermine the relations founded upon them, and make this Court the unwilling and uncertain arbiter between the concededly valid laws and decrees of sister states. From *Bell* and *Andrews* to *Davis* to *Haddock* to *Williams* and now back to *Haddock* and *Davis* through *Williams* again[1]—is the maze the Court has travelled in a domiciliary wilderness, only to come out with no settled constitutional policy where one is needed most.

Nevada's judgment has not been voided. It could not be, if the same test applies to sustain it as upholds the North Carolina conviction.[2] It stands, with the marriages founded upon it, unimpeached. For all that has been determined or could be, unless another change is in the making, petitioners are lawful husband and wife in Nevada. *Williams* v. *North Carolina I*, 317 U. S. 287; *Williams* v. *North Carolina II*, decided this day. They may be such everywhere outside North Carolina. Lawfully wedded also, in North Carolina; are the divorced spouse of one and his wife, taken for all we know in reliance upon the Nevada decree.[3]

[1] Cf. text *infra* Part I.

[2] Presumably it would be our function "to retry the facts" no more if the Nevada decree were immediately under challenge here than it is to do so when the North Carolina judgment is in issue. It would seem therefore that we owe the same deference to Nevada's finding of domicil as we do to North Carolina's. Cf. text at note 4 *et seq.*

[3] The record indicates that Mr. Hendrix "had brought no divorce proceeding against the *feme* defendant prior to the first trial of this cause, but that he has since and remarried." Although the evidence shows institution of this proceeding, it does not show a decree was entered prior to

That is, unless another jury shall find they too are bigamists for their reliance. No such jury has been impanelled. But were one called, it could pronounce the Nevada decree valid upon the identical evidence from which the jury in this case drew the contrary conclusion. That jury or it and another, if petitioners had been tried separately, could have found one guilty, the other innocent, upon that evidence unvaried by a hair. And, by the Court's test, we could do nothing but sustain the contradictory findings in all these cases.

I do not believe the Constitution has thus confided to the caprice of juries the faith and credit due the laws and judgments of sister states. Nor has it thus made that question a local matter for the states themselves to decide. Were all judgments given the same infirmity, the full faith and credit clause would be only a dead constitutional letter.

I agree it is not the Court's business to determine policies of divorce. But precisely its function is to lay the jurisdictional foundations upon which the states' determinations can be made effective, within and without their borders. For in the one case due process, in the other full faith and credit, commands of equal compulsion upon the states and upon us, impose that duty.

I do not think we perform it, we rather abdicate, when we confide the ultimate decision to the states or to their juries. This we do when, for every case that matters, we make their judgment conclusive. It is so in effect when the crucial concept is as variable and amorphous as "domicil," is always a conclusion of "ultimate fact," and can be established only by proof from which, as experience shows, contradictory inferences may be made as strikes the local trier's fancy. The abdication only becomes more obviously explicit when we avowedly confess that the faith and credit due may be determined either way, wherever "it cannot reasonably be claimed that one set of inferences rather than another" could not be drawn concerning the very matter determined by the judgment; and the final choice upon such a balance is left with the local jury.

No more unstable foundation, for state policies or marital relations, could be formulated or applied. In no region of adjudi-

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his remarriage. Whether or not he actually relied upon the Nevada decree, thousands of spouses so divorced do so rely, thus founding new relations which are equally subject to invalidation by jury finding and are always beclouded by a judgment like that rendered in this case.

cation or legislation is stability more essential for jurisdictional foundations. Beyond abnegating our function, we make instability itself the constitutional policy when the crux is so conceived and pivoted.

I.

What, exactly are the effects of the decision? The Court is careful not to say that Nevada's judgment is not valid in Nevada. To repeat, the Court could not so declare it, unless a different test applies to sustain that judgment than supports North Carolina's. Presumably the same standard applies to both; and each state accordingly is free to follow its own policy, wherever the evidence, whether the same or different, permits conflicting inferences of domicil, as it always does when the question becomes important.[4]

This must be true unless, contrary to the disclaimer, this Court itself is "to retry the facts." The Court no more could say that the Nevada evidence permitted no conclusion of domicil there than it now can say the North Carolina evidence would not allow a finding either way. This apparently is conceded. The proof was not identical. But it was not so one-sided in either case that only one conclusion was compelled. The evidence in Nevada was neither that strong nor that weak.[5] Seldom, if ever, is it so.

The necessary conclusion follows that the Nevada decree was valid and remains valid within her borders. So the marriage is good in Nevada, but void in North Carolina, just as it was before "the jurisdictional requirement of domicil [was] freed from confusing refinements about 'matrimonial domicil,' see *Davis* v. *Davis*, 305 U. S. 32, 41, and the like." See also *Haddock* v. *Haddock*, 201 U. S. 562.

The characterization "in rem" has been dropped. But it is clear from the result and from the opinion that the more "confusing refinements" and consequences, including the anomalous status *Haddock* approved, have not completely disappeared. We are not told definitely whether Nevada's adjudication or North

[4] Cf. text at notes 2, 5, 7, 9, 11 *et seq.*

[5] The Nevada court knew that petitioners recently had come from North Carolina, resided in tourist quarters, an auto court, and by inference at least that they had come together. There was in the facts sufficient basis for conclusion that they had no "*bona fide*" intention of remaining permanently or indefinitely, after the decrees were rendered, if the court had wished to draw that conclusion. Credibility in such circumstances is always for the trier of fact. Worcester County Trust Co. v. Riley, 302 U. S. 292, 299; Busbank v. Ernst, 232 U. S. 162, 164.

Carolina's must be respected, when the question is raised in some one of the other forty-six states. But one thing we do know. "*The State of domiciliary origin* should not be bound by *an unfounded, even if not collusive*, recital in the record of a court of another State." The opinion goes on to repeat: "If a finding by the court of one State that the domicil in another State has been abandoned were conclusive *upon the old domiciliary State*, the policy of each State in matters of most intimate concern would be subverted by the policy of every other State." (Emphasis added.)

The question is not simply pertinent, it is imperative, whether "matrimonial domicil" has not merely been recast and returned to the play under the common law's more ancient name of "domicil of origin." For North Carolina is the only state which, upon the facts, conceivably could qualify either as "matrimonial domicil" or as "domicil of origin," whether or not they differ. Under the former conception it was at least doubtful whether sheer reexamination of "the jurisdictional fact" previously determined could be made outside the state granting the divorce and the state of "matrimonial domicil."[3] Now we are told the decree "must be respected by the other forty-seven States *provided—and it is a big proviso*—the conditions for the exercise of power by the divorce-decreeing court are validly established *whenever* that judgment is *elsewhere* called into question." (Emphasis added.)

If this means what it says, the proviso is big. It swallows the provision. Unless "matrimonial domicil," banished in *Williams I*, has returned renamed in *Williams II*, every decree becomes vulnerable in every state. Every divorcee, wherever granted, whether upon a residence of six weeks, six months or six years, may now be reexamined by every other state, upon the same or different evidence, to redetermine the "jurisdictional fact," always the ultimate conclusion of "domicil." For the grounds of the decision wholly negate that its effect can be limited to decrees of states having so-called "liberal" divorce policies; or to decrees recently granted; or to cases where different evidence is presented. It is implicit and inherent in the "unitary-domicil, jurisdictional-fact, permissible-inference" rule that any decree, granted after any length of time, upon any ground for divorce, and however solid the proof, may be reexamined either by "the state of domiciliary origin" or by any other state, as the case uncertainly may

[3] Haddock v. Haddock, 201 U. S. 562, 572.

be. And all that is needed, to disregard it, is *some* evidence from which a jury reasonably may conclude there was no domiciliary intent when the decree was rendered. That is, unless the Court means to reserve decision upon the weight of the evidence and thus "to retry the facts," contrary to its declared intention, in some case or cases not defined or indicated.

II.

Obviously more is involved than full faith and credit for judgments of other states. Beneath the judgments of Nevada lie her statutory law and policy. These too are denied recognition. This is not a case in which the denial extends, or could extend, to the judgment alone. For the North Carolina verdict and judgment do not purport to rest on any finding of fraud or other similar ground, whereby the petitioners procured judgments from the Nevada courts which the manner of their procurement vitiates.[7]

No such issue, impeaching the Nevada decree, has been made. The state asked no instructions on such a theory and none were given.[8] The verdict and judgment therefore have not determined and do not rest upon any such ground.

In view of this fact I am completely at loss to understand what is meant, in the context of this case, by "an *unfounded*, even if *not collusive*, recital" which the state of domiciliary origin, perhaps others too, is free to disregard. The statement itself negates collusion as a ground for the decision. And, as I read the remainder of the opinion, it concedes and must concede, if the two judgments

[7] The case was not tried on any theory that Nevada's court was defrauded or her law evaded. No effort was made to bring it within that well recognized exception to the binding effect of judgments generally. United States v. Throckmorton, 98 U. S. 61; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399. Nor is that ground asserted here to support the denial of credit. It was not suggested, and is not now, that Nevada either would, or could be required to, set aside her judgment or reach a different result, upon the evidence this record presents; or that she now is bound to give full faith and credit to North Carolina's decision. Nor has it been contended that the Nevada evidence was not adequate to support her finding.

[8] Petitioners' motion for judgment by nonsuit, which the court denied, was grounded in part upon the absence of evidence of fraud upon the Nevada court or law and alleged incompetence of such evidence if tendered. They also objected to the portions of the charge which submitted the issue of "bona fide domicil" without reference to the effect of the evidence as tending to vitiate the Nevada decree. "Bona fides" is inherently an element in domiciliary intent. Merely adding the phrase as qualifying adjective does not raise an issue of fraud. For this reason, founded in the state of the record, the Court eschews grounding the decision upon fraud or collusion.

are to be tested alike; that the Nevada decree was not unfounded. The shape the issues have taken compels this conclusion.

Accordingly the case must be considered as shorn of any element of fraud, deceit or evasion of Nevada's law, of showing that the Nevada court was imposed upon in any way or did other than apply the Nevada law according to its true intent and purpose. It must be taken also as devoid of any showing that Nevada failed in any way to comply with every requirement this Court has made respecting jurisdiction or due process of law for rendering a valid divorce decree. *Williams* v. *North Carolina*, 317 U. S. 287.

The case therefore stands stripped of every difference, prudently material, from the Nevada proceedings save two. There was none, jurisdictionally, in the issues. There was only different evidence upon which the same issue was determined in opposite fashions. And the states had different policies concerning divorce.

The difference in the evidence affected solely events taking place after the Nevada decree, the return to North Carolina and the cohabitation there. Ordinarily, valid judgments are not overturned, *Schneiderman* v. *United States*, 320 U. S. 118, or disregarded upon such retroactive proof.[9] But here this proof was not tendered in attack upon the Nevada decree. It was offered and admitted exclusively to relitigate the same issue that decree had determined, upon adequate evidence and in full compliance with Nevada law and the federal law giving Nevada jurisdiction to determine it. *Williams I*; *Williams II*. Its sole function was to show that petitioners did not have the very intent the Nevada court, with eyes not blinded,[10] had found they possessed.

Moreover, the character of the Court's ruling makes the difference in the evidence, as it bore upon the controlling issue, of no materiality. It is not held that denial of credit will be allowed, only if the evidence is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact "not unreasonably." Presumably the Court will not "retry the facts" in either case.

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[9] Cf. Cochrane v. Deener, 95 U. S. 355; United States v. Maxwell Land-Grant Co., 121 U. S. 325, 381; United States v. San Jacinto Tin Co., 125 U. S. 273, 300; Lalone v. United States, 164 U. S. 255; United States v. American Bell Tel. Co., 167 U. S. 224. See 9 Wigmore, Evidence (3rd ed.) § 2498.

[10] Cf. note 5.

But it does not define "not unreasonably." It vaguely suggests a supervisory function, to be exercised when the denial strikes its sensibilities as wrong, by some not stated standard. So to suspend the matter is not law. It is only added uncertainty.

If the Court means not "to retry the facts," the suggestion is wholly out of place. Then the test will be as it is in other cases where the question is whether a jury's verdict will be sustained, upon an issue alleging want of supporting evidence. There will be no "weighing." There will be only examination for sufficiency, with the limits marked by "scintillas" and the like.[11]

If this is the test, for all practical purposes the Court might as well declare outright that states of domiciliary origin are free to deny faith and credit to divorces granted elsewhere. For the case will be rare indeed where, by this standard, "domicil" can be determined as a matter of law, when divorce has been secured after departure from such a state. These are the only cases that matter. The issue does not arise with stay-at-homes. With others, it always can be raised and nearly always with "some" evidence, more than a "scintilla," to sustain both contentions.

But if the test is different, "weighing" necessarily becomes involved and implicitly is what has been done in this case, notwithstanding the disclaimer. In that event, the crux of jurisdiction becomes the difference in the evidence; in this case, the return to North Carolina and cohabitation there.

If this is the decision's intended effect, it should be squarely so declared. Too much hangs for too many people and for the states themselves upon beclouding it with a "different set of inferences—refusal to retry the facts" gloss or otherwise. It cannot be assumed that the matter will affect only a few. For this has become a nation of transient people. Lawyers everywhere advise for or against divorce and courts grant or deny it, depending not on the probability that the case will come here, but on what is done here with the few cases which do come. The matter is altogether too serious, for too many, for glossing over the crucial basis of decision.

Whether the one test or the other is intended, or perhaps still another not suggested, North Carolina's action comes down to

[11] Cf. Commissioners of Marion County *v.* Clark, 94 U. S. 278, 284; Jones *v.* East Tennessee, V. & G. R. Co., 128 U. S. 443, 445; Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 68; Bailey *v.* Central Vermont Ry., 319 U. S. 350, 353, 354; Tennant *v.* Peoria & P. U. Ry. Co., 321 U. S. 29, 35; 9 Wigmore, § 2494.

sheer denial of faith and credit to Nevada's law and policy, not merely to her judgment; and the decision here, to approval of this denial. The real difference, in my opinion the only material one, as the issues and the decision have been made on this record, is that one suit and judgment took place in Nevada, the other in North Carolina, and the two states have different policies relating to divorce. Nor does the degree or quality of the difference in policies matter. It also is not weighed.[12] The difference may be small for anything that is said, yet there is freedom to withhold credit.

If this is the test, every divorce granted a person who has come from another state is vulnerable wherever state policies differ, as they do universally if no account is taken of the weight of difference.

It is always a serious matter for us to say that one state is bound to give effect to another's decision, founded in its different policy. That mandate I would not join in any case if not compelled by the only authority binding both the states and ourselves. Conceivably it might have been held that the full faith and credit clause has no application to the matters of marriage and divorce. But the Constitution has not left open that choice. And such has not been the course of decision. The clause applies, but from today it would seem only to compel "respect" or something less than faith and credit, whenever a jury concludes "not unreasonably," by ultimate inference from the always conflicting circumstantial evidence, that it should not apply. Wherever that situation exists, the finding that there was no "bona fide" domiciliary intent comes in every practical effect to this and nothing more.

Permitting the denial is justified, it is said, because we must have regard also for North Carolina's laws, policies and judgments. And so we must. But thus to state the question is to beg the controlling issue. By every test remaining effective, and not disputed, Nevada had power to alter the petitioner's marital status. She made the alteration. If it is valid, neither North Carolina nor we are free to qualify it by saying it shall not be effective there, while it is effective in Nevada, and stands without impeachment for ineffectiveness there.

Just that denial is what the terms of the Constitution and the Act of Congress implementing them forbid. It is exactly for the

[12] Cf. note 16.

situation where state policies differ that the clause and the legislation were intended. Without such differences, the need for constitutional limitation was hardly one of magnitude. The apparent exceptions for fraud and want of jurisdiction were never intended to enable the states to disregard the provision and each other's policies, crystallized in judgment, when every requisite for jurisdiction has been satisfied and no showing of fraud has been presented. They have a different purpose, one consistent with the constitutional mandate, not destructive of its effect. That purpose is to make sure that the state's policy has been applied in the judgment, not to permit discrediting it or the judgment when the one validly crystallizes the other. Such an exception, grafted upon the clause, but nullifies it. It does so totally when the weight and quality of the difference in policies has no bearing on the issue.

Lately this fact has been recognized increasingly in relation to other matters than divorce.[13] The very function of the clause is to compel the states to give effect to the contrary policies of other states when these have been validly embodied in judgment. To this extent the Constitution has foreclosed the freedom of the states to apply their own local policies. The foreclosure was not intended only for slight differences or for unimportant matters. It was also for the most important ones. The Constitution was not dealing with puny matters or inconsequential limitations. If the impairment of the power of the states is large, it is one the Constitution itself has made. Neither the states nor we are free to disregard it. The "local public policy" exception is not an exception, properly speaking. It is a nullifying compromise of the provision's terms and purpose.

The effort at such compromise, in matters of divorce and remarriage, has not been successful. Together with the instrument by which the various attempts have been made, i. e., the notion of "unitary domicil" constitutionalized as "jurisdictional fact," this effort has been the source of the long confusion in the circle of decision here. To it may be attributed the reification of the marital status, now discarded in name if not in substance, and the splitting of the *res* to make two people husband and wife in one state, divorced in another. *Haddock* v. *Haddock*, *supra*; cf. *Williams II*. Now it leads to practical abandonment of the effort, of

[13] Cf. Milwaukee County v. M. E. White Co., 296 U. S. 268; Titus v. Wallick, 306 U. S. 282; Texas v. Florida, 306 U. S. 398, 410.

this Court's function, and of the obligation placed upon the states, by committing to their juries for all practical effects the final choice to disregard it.

III.

I do not concur in the abdication. I think a major operation is required to prevent it. The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate region. In its origin the idea of domicil was stranger to the federal system and the problem of allocating power within it. The principal result of transplanting it to constitutional soil has been to make more complex, variable and confusing than need be inherently the allocation of authority in the federal scheme. The corollary consequence for individuals has been more and more to infuse with uncertainty, confusion, and caprice those human relations which most require stability and depend for it upon how the distribution of power is made.

In my opinion these consequences are inevitable as long as "unitary domicil" usurps the role of "jurisdictional fact" and is applied under the "permissible inference" rule to turn questions of power first for creating jurisdiction, then for nullifying the effects of its exercise, to settle and then unsettle the human relations resting upon the power's exertion. The conception has outlived its jurisdictional usefulness unless caprice, confusion and contradiction are the desirable criteria and consequences of jurisdictional conceptions.

Stripped of its common-law gloss, the basic constitutional issue inherent in the problem is whether the states shall have power to adopt so-called "liberal" divorce policies and grant divorces to persons coming from other states while there transiently or for only short periods not sufficient in themselves, absent other objective criteria, to establish more than casual relations with the community. One could understand and apply, without decades of confusion, a ruling that transient divorces, founded on fly-by-night "residence," are invalid where rendered as well as elsewhere; in other words, that a decent respect for sister states and their interests requires that each, to validly decree divorce, do so only after the person seeking it has established connections which give

evidence substantially and objectively that he has become more than casually affiliated with the community. Until then the newcomer would be treated as retaining his roots, for this purpose, as so often happens for others, at his former place of residence. One equally could understand and apply with fair certainty an opposite policy frankly conceding state power to grant transient or short-term divorces, provided due process requirements for giving notice to the other spouse were complied with.

Either solution would entail some attenuation of state power. But that would be true of any other, which would not altogether leave the matter to the states and thus nullify the constitutional command. Strong considerations could be stated for either choice. The one would give emphasis to the interests of the states in maintaining locally prevailing sentiment concerning familial and social institutions. The other would regard the matter as more important from the standpoint of individual than of institutional relations and significance. But either choice would be preferable to the prevailing attempt at compromise founded upon the "unitary domicil-jurisdictional fact-permissible inference" rule.

That compromise gives effect to neither policy. It vitiates both; and does so in a manner wholly capricious alike for the institutional and the individual aspects of the problem. The element of caprice lies in the substantive domiciliary concept itself and also in the mode of its application.

Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home, with all its ancient associations of permanence. But "home" in the modern world is often a trailer or a tourist camp. Automobiles, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, "home" in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay, "either permanently or for an indefinite or unlimited length of time."[14] No other connection of

[14] Citation of authority is hardly needed for reference to the difficulties courts have encountered in the effort to define this intent. "Animus manendi" is often a Latin refuge which succeeds only in evading not in resolving the question with which Job wrestled in his suffering.

permanence is required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home.

Domicil thus combines the essentially contradictory elements of permanence and instantaneous change. No legal conception, save possibly "jurisdiction," of which it is an elusive substratum, affords such possibilities for uncertain application. The only thing certain about it, beyond its uncertainty, is that one must travel to change his domicil. But he may travel without changing it, even remain for a lifetime in his new place of abode without doing so. Apart from the necessity for travel, hardly evidentiary of stabilized relationship in a transient age, the criterion comes down to a purely subjective mental state related to remaining for a length of time never yet defined with clarity.

With the crux of power fixed in such a variable, small wonder that the states vacillate in applying it and this Court ceaselessly seeks without finding a solution for its quandary. But not all the vice lies in the substantive conception. Only lawyers know, unless now it is taxpayers[1] and persons divorced, how rambling is the scope of facts from which proof is ever drawn to show and negate the ultimate conclusion of subjective "fact." They know, as do the courts and other tribunals which wrestle with the problem, how easily facts procreative of conflicting inferences may be marshalled and how conjectural is the outcome. There is no greater legal gamble. Rare is the situation, where much is at stake, in which conflicting circumstances cannot be shown and where accordingly conflicting ultimate inferences cannot be drawn.

The essentially variable nature of the test lies therefore as much in the proof and the mode of making the conclusion as in the substantive conception itself. When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. The "unitary domicil-jurisdictional fact

[1] Cf. Tilt v. Kelsey, 207 U. S. 43; Iowa v. Slimmer, 248 U. S. 115; Worcester County Trust Co. v. Riley, 302 U. S. 292; Texas v. Florida, 306 U. S. 398; Sweeney v. District of Columbia, 113 F. 2d 25, cert. denied, 310 U. S. 631. Compare District of Columbia v. Murphy, 314 U. S. 441, with District of Columbia v. Pace, 320 U. S. 698. See 121 A. L. R. 1200; Tweed and Sargent, Death and Taxes Are Certain—But What of Domicile? (1959) 53 Harv. L. Rev. 68.

permissible inference" variable not only is an inconstant, vacillating pivot for allocating power. It is inherently a surrender of the power to make the allocation.

That effect is not nullified by vague reservation of supervisory intent. For supervision in any case that matters, that is, wherever the issue is crucial, nullifies the test. I think escape should be forthright and direct. It can be so only if the attempt to compromise what will not yield to compromise is forsworn, with the ancient gloss that serves only to conceal in familiar formula its essentially capricious and therefore nullifying character. This discarded, choice then would be forced between the ideas of transiency with due process safeguards and some minimal establishment of more than casual or transitory relations in the new community, giving the newcomer something of objective substance identifying him with its life.

With this choice made, objective standards of proof could apply, for the thing to be proved would be neither subjective nor so highly variable as inference of state of mind in ambiguous situation always must be. Neither domicil's sharp subjective exclusions between the old and the new nor its effort to probe the unprovable workings of thought at some past moment, as in relation to the length of time one purposed remaining or whether there was vestigial and contingent intent to return, would be material.

With the subjective substratum removed, the largest source of variable and inconstant decision would disappear. This would be true, whether transiency guarded by due process or some more established but objectively determinable relation with the community were chosen for the standard to turn the existence of power. Either choice would be preferable to the variable which can give only inconstant and capricious effects, nullifying both policies.

If by one choice states of origin were forced to modify their local policies by giving effect to the different policies of other states when crystallized in valid judgments, that would be no more than the Constitution in terms purports to require. And it may be doubted their surrender would be much greater in practical effects than the present capricious and therefore deceptive system brings about.[16] If by some more restrictive choice states now free to give

[16] The residence requirements of the states for absolute divorce vary depending at times on the ground for divorce relied on, the place where the cause of action arose, or other factors. Speaking generally, approximately 33 states require one year's residence in most divorce actions. Nine states

essentially transient divorce were required to modify that policy for locally valid effects, ~~within the limits~~ of any objective standard that conceivably would be acceptable for constitutional purposes, the obligations they owe to the nation and to sister states would seem amply to justify that modest curtailment of their power. It is hard to see what legitimate substantial interest a state may have in providing divorces for persons only transiently there or for newcomers before they have created, by reasonable length of stay or other objective standards, more than fly-by-night connections.

I therefore dissent from the judgment which, in my opinion, has permitted North Carolina at her substantially unfettered will to deny all faith and credit to the Nevada decree, without in any way impeaching or attempting to impeach that judgment's constitutional validity. But if she is not to be required thus to give the faith and credit due, in my opinion she should not be allowed to deny it by any standard of proof which is less than generally is required to overturn or disregard a judgment upon direct attack. Cf. *Schneiderman* v. *United States*, 320 U. S. 118. The solemnity of the judicial act and the very minimum of "respect" due the action of a sister state should compel adherence to this standard, though doing so would not give *the full* faith and credit which the Constitution commands. To approximate the constitutional policy would be better than to nullify it.

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are more severe, 7 of these requiring 2 years' residence and two a longer period. Six states are less severe. Of these, North Carolina at present requires a 6 months' residence and the others six weeks to three months. See Warren, Schouler Divorce Manual (1944) 705-720. Thus, practically-speaking, 39 states require one year or less, only 9 longer.

It seems questionable, at any rate, that the grounds for divorce as such have "jurisdictional" significance. Presumably, if length of residence is the controlling factor, all of the states would be required to give effect to divorces granted by the 42 requiring one year or longer, unless the greatly preponderant legislative judgment is to be disregarded. The permissible denial accordingly would extend at the most to decrees granted by the six states requiring less than one year. It is difficult to see how greatly disruptive effects would be created for them or for the other states by requiring them to approximate the generally prevailing judgment as to the length of the period appropriate for granting impeccable divorce.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, vs. The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Black, dissenting.

Anglo-American law has, until today, steadfastly maintained the principle that before an accused can be convicted of crime, he must be proven guilty beyond a reasonable doubt. These petitioners have been sentenced to prison because they were unable to prove their innocence to the satisfaction of the State of North Carolina. They have been convicted under a statute so uncertain in its application that not even the most learned member of the bar could have advised them in advance as to whether their conduct would violate the law. In reality the petitioners are being deprived of their freedom because the State of Nevada, through its legislature and courts, follows a liberal policy in granting divorces. They had Nevada divorce decrees which authorized them to remarry. Without charge or proof of fraud in obtaining these decrees,[1] and without holding the decrees invalid under Nevada law, this Court affirms a conviction of petitioners, for living together as husband and wife. I cannot reconcile this with the Full Faith and Credit Clause and with congressional legislation passed pursuant to it.

It is my firm conviction that these convictions cannot be harmonized with vital constitutional safeguards designed to safeguard individual liberty and to unite all the states of this whole country into one nation. The fact that two people will be deprived of their constitutional rights impels me to protest as vigorously as I can against affirmance of these convictions. Even more, the Court's opinion today will cast a cloud over the lives

[1] Previous decisions of this Court have asserted that a state cannot justify its refusal to give another state's judgment full faith and credit, at least, in the absence of a showing that fraud is an adequate ground for setting the judgment aside in the state where it was rendered. See Christmas v. Russell, 5 Wall. 290, 302-304; Maxwell v. Stuart, 22 Wall. 77, 81; Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 134.

of countless numbers of the multitude of divorced persons in the United States. The importance of the issues prompts me to set out my views in some detail.

Statistics indicate that approximately five million divorced persons are scattered throughout the forty-eight states.[2] More than 85% of these divorces were granted in uncontested proceedings.[3] Not one of this latter group can now retain any feeling of security in his divorce decree. Ever present will be the danger of criminal prosecution and harassment.

All these decrees were granted by state courts. *Erie* v. *Tompkins*, 304 U. S. 64, and cases following it, recognized the obvious truth, that rules of law laid down by state courts are binding. These judicial "laws" are represented by decrees, judgments and court opinions. Today's opinion, however, undermines and makes uncertain the validity of every uncontested divorce decree. It wipes out every semblance of their finality and decisiveness. It achieves what the Court terms the "desirable effect" of providing the "same" quality to *every* divorce decree, "wherever the question arises"—it endows them all alike with the "same" instability and precariousness. The result is to classify divorced persons in a distinctive and invidious category. A year ago, a majority of this Court in a workmen's compensation case declared that the Full

[2] According to the best available statistics more than five million divorces were granted in the last twenty years and the annual rate is steadily increasing. See Marriage and Divorce Statistics, Bureau of the Census, 1942, and the same reports for different years; Divorce, Depression and War, Social Forces, University of North Carolina Press, Dec. 1943, 191, 192; Social and Statistical Analysis, Law and Contemporary Problems, Duke University, Summer 1944; 1940 Census, Bureau of the Census, Vol. 4, Tables 29 and 48; Ogburn, Marriages, Births and Divorces, Annals, American Academy, Sept. 1943, 20.

[3] This percentage is shown by the various "Marriage and Divorce" publications of the Bureau of the Census, Department of Commerce. Careful studies in particular localities have indicated that the percentage of uncontested divorces is substantially above the 85% shown in Census Reports. In Maryland, for instance, 3306 petitions for divorce were filed in 1929. 1847 defendants failed to answer and the complainant had decrees in all but six cases. "A total of 1459 defendants, however, filed answers to the plaintiff's allegations and thus staged a technical contest. This does not necessarily mean that a given defendant was opposed to a decree being granted. Of these 1459 technically contested actions, 442 dropped out without coming to hearing, thus leaving 1017 technical contests in the field. . . . If we accompany the plaintiffs in the 1017 remaining technical contests to the hearing, we find little in the way of substantial contest. There is a positive record of no contest in 808 cases; of a contest in 81 cases; and data are not available with respect to contest in 128 cases. . . . It seems likely that in less than 100 cases was there at the hearing a contest concerning whether a decree should be granted." Marshall and May, The Divorce Court, 226-227.

Faith and Credit Clause of the Constitution was a "nationally unifying force";[4] today, as to divorce decrees, that clause, coupled with the new content added to the due process clause, has become a nationally disruptive force. Uncontested divorce decrees are thus so degraded that a person who marries in reliance upon them can be sent to jail. With much language the Court has in effect adopted the previously announced hypothesis upon which the North Carolina Supreme Court permitted another person to be sent to prison, namely, that "the full faith and credit clause does not apply to actions for divorce, and that the states alone have the right to determine what effect shall be given to the desires of other states in this class of cases." *State* v. *Herron*, 175 N. C. 754, 758; cf. *Matter of Holmes*, 291 N. Y. 261, 273.

The petitioners were married in Nevada. North Carolina has sentenced them to prison for living together as husband and wife in North Carolina. This Court today affirms those sentences without a determination that the Nevada marriage was invalid under that State's laws. This holding can be supported, if at all, only on one of two grounds: (1) North Carolina has extra-territorial power to regulate marriages within Nevada's territorial boundaries, or, (2) North Carolina can punish people who live together in that state as husband and wife, even though they have been validly married in Nevada. A holding based on either of these two grounds encroaches upon the general principle recognized by this Court that a marriage validly consummated under one state's laws is valid in every other state.[5] If the Court is today abandoning that principle, it takes away from the states a large part of their hitherto plenary control over the institution of marriage. A further consequence is to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional right to pass from a state in which they were validly married into another state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union. *Edwards* v. *California*, 314 U. S. 160. It is true that persons validly married under the laws of one state have been convicted of crime for living together

[4] Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 439.

[5] Loughran v. Loughran, 292 U. S. 216, 223-225; Dudley v. Dudley, 151 Iowa 142. Ex parte Crane, 136 N. W. 587; see Radin, Authenticated Full Faith and Credit Clause, 39 Ill. L. R. 1, 32. See also Annotations, 60 Am. St. Rep. 942; 28 L. R. A. N. S. 754; 127 A. L. R. 437.

in other states.[6] But those state convictions were not approved by this Court. And never before today has this Court decided a case upon the assumption that men and women validly married under the laws of one state could be sent to jail by another state for conduct which involved nothing more than living together as husband and wife.

The Court's opinion may have passed over the marriage question on the unspoken premise that the petitioners were without legal capacity to marry. If so, the primary question still would be whether that capacity, and other issues subsidiary to it, are to be determined under Nevada, North Carolina, or Federal law. Answers to these questions require a discussion of the divorce decrees awarded to the petitioners in a Nevada court prior to their marriage there.

When the Nevada decrees were granted, the petitioners' former spouses lived in North Carolina. When petitioners were tried and convicted, one of their former spouses was dead and the other had remarried. Under the legal doctrine prevailing in Nevada and in most of the states, these facts would make both the decrees immune from attack unless, perhaps, by persons other than the North Carolina spouses, whose property rights might be adversely affected by the decrees.[7] So far as appears from the record no person's property rights were adversely affected by the dissolution decrees. None of the parties to the marriage, although formally notified of the Nevada divorce proceedings, made any protest before or after the decrees were rendered. The State did not sue here to protect any North Carolinian's property rights or to obtain support for the families which had been deserted. The result of all this is that the right of the State to attack the validity of these decrees in a criminal proceeding is today sustained, although the State's citizens, on whose behalf it purports

[6] This question has arisen most frequently in the application of state laws making it a criminal offense for persons of different races to live together as husband and wife. See e. g., State v. Jett, 7 Baxt. (Tenn.) 9. That case has been explained as a holding that "Without denying the validity of a marriage in another State the privileges flowing from marriage may be subject to local law." Yarbrough *v.* Yarbrough, 290 U. S. 202, 218. See also Greenhow *v.* James, 80 Va. 636. Cf. Pearson *v.* Pearson, 51 Cal. 120; State *v.* Ross, 76 N. C. 242; Whittington *v.* McCaskill, 65 Fla. 162.

[7] See e.g., Foy *v.* Smith's Estate, et al., 58 Nev. 371; Dwyer *v.* Nolan, 40 Wash. 459, 1 L. R. A. N. S. 551; Chapman *v.* Chapman, 224 Mass. 427; Bingham *v.* Bingham, 255 App. Div. (N. Y.) 463; Moyer *v.* Koontz, 103 Wis. 22; Leathers *v.* Stewart, 108 Me. 96, Ann. Cas. 1913 B 366, 369-372; Kirchner *v.* Dietrich, 119 Cal. 502; Shouler Divorce Manual, 588-590.

to act, could not have done so at the time of the conviction in a civil proceeding. Furthermore, all of the parties to the first two marriages were apparently satisfied that their happines did not lie in continued marital cohabitation. North Carolina claims no interest in abridging their individual freedom by forcing them to live together against their own desires. The State's interest at the time these petitioners were convicted thus comes down to its concern in preserving a bare marital status for a spouse who had already married again. If the State's interest before that time be considered, it was to preserve a bare marital status as to two persons who had sought a divorce and two others who had not objected to it. It is an extraordinary thing for a state to procure a retroactive invalidation of a divorce decree, and then punish one of its citizens for conduct authorized by that decree, when it had never been challenged by either of the people most immediately interested in it. I would not permit such an attenuated state interest to override the Full Faith and Credit Clause of the Constitution and an Act of Congress pursuant to it.[8] Here again, North Carolina's right to attack this judgment, despite the Full Faith and Credit Clause and the Congressional enactment, is not based on Nevada law; nor could it be. For in Nevada, even the Attorney General could not have obtained a cancellation of the decree on the ground that it was rendered without jurisdiction. *State v. Moore*, 46 Nevada 65. This makes it clear beyond all doubt that North Carolina has not given these decrees the same effect that they would be given in the courts of Nevada.

The Court permits North Carolina to disregard the decrees on the following line of reasoning. No state need give full faith and credit to a "void" decree. A decree rendered by a court without "jurisdiction" is "void." No state court has "jurisdiction" to grant a divorce unless one of the parties is "domiciled" in the state. The North Carolina court has decided that these petitioners

[8] Here too we approach the domain where the line may be shadowy between the individual rights of people to choose and keep their own associates and the power of the state to prescribe who shall be their most intimate associates. People in this country do not "belong" to the state. Le Meseuir *v.* Le Meseuir, and others, [1895] A. C. 517. Our Constitution preserves an area of individual freedom which the state has no right to abridge. The flavor of the Court's opinion is that a state has supreme power to control its domiciliaries' conduct wherever they go and that the state may prohibit them from getting a divorce in another state. In this aspect the decision is not confined to a holding which relates to state as opposed to federal rights. It contains a restriction of individual as opposed to state rights. See Radin, *supra*, 28-32.

had no "domicile" in Nevada. Therefore, the Nevada court had no "jurisdiction", the decrees are "void", and North Carolina need not give them faith or credit? The solution to all these problems depends in turn upon the question common to all of them—does State law or Federal law apply?

The Constitution provides that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the *Effect thereof.*" (Emphasis added.) Acting pursuant to this constitutional authority, Congress in 1790 declared what law should govern and what "Effect" should be given the judgments of state courts. Its command is that they "shall have such faith and credit given to them as they have by law or usage in the Courts of the state from which they are taken". 28 U. S. C. 687. If, as the Court today implies, divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so. We should not attempt to solve the "divorce problem" by constitutional interpretation. At least, until Congress has commanded a different "Effect" for divorces granted on a short sojourn within a state, we should stay our hands. A proper respect for the Constitution and the Congress would seem to me to require that we leave this problem where the Constitution did. If we follow that course, North Carolina cannot be permitted to disregard the Nevada decrees without passing upon the "faith and credit" which Nevada itself would give to them under its own "law or usage." The Court has decided the matter as though it were a purely *federal* question. Congress and the Constitution declared it to be a *state* question. The logic of the Court does not persuade me that we should ignore these mandates of the Congress and the Constitution. Nevada's decrees purported to grant petitioners an absolute divorce with a right to remarry. No "law or usage" of Nevada has been pointed out to us which would indicate that Nevada would, under any circumstances, consider its decrees so "void" as to warrant imprisoning those who have remarried in reliance upon such existing and unannulled decrees.

A judgment may be "void" in the general sense, and yet give rise to rights and obligations. While on the books its existence is a fact, not a theory. And it may be said of decrees, later invalidated, as of statutes held unconstitutional, that "The past cannot always be erased by a new judicial declaration. The effect

of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. . . . an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374. Despite the conclusion that a judgment is "void", courts have in the interest of substantial justice and fairness declined to attribute a meaning to that word which would make such judgments, for all purposes, worthless scraps of paper.[9] After a judgment has been declared "void" it still remains to decide as to the consequences attached to good faith conduct between its rendition and its nullification. That determination, I think, must, in this case, under the Full Faith and Credit Clause, be made in accordance with the "law or usage" of Nevada—not of North Carolina or the Federal government.

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This brings me to the Court's holding that Nevada decrees were "void." That conclusion rests on the premise that the Nevada court was without jurisdiction because the North Carolina Court found that the petitioners had no "domicile" in Nevada. The Nevada court had based its decree on a finding that "domicile" had been established by evidence before it. As I read that evidence, it would have been sufficient to support the findings, had the case been reviewed by us. Thus, this question of fact has now been adjudicated in two state courts with different results. It should be noted now that this Court very recently has said as to the Full Faith and Credit Clause and the 1790 Congressional enactment, that "From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other." *Magnolia Petroleum Co.* v. *Hunt*, *supra*, at 438.[10] That it was appropriate for

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[9] Gray v. Prignardello, 1 Wall. 627, 634; Colvin v. Colvin, 2 Paige (N. Y.) 385; Harper, The Myth of the Void Divorce, 2 Law and Contemporary Problems, 335; The Validity of Void Divorces, 79 U. Pa. L. Rev. 158; Tainter, Restitution of Property Transferred Under Void or Later Reversed Judgments, 9 Miss L. J. 137.

[10] The Nevada court had general jurisdiction to grant divorces, and the complaint was required to allege domicile along with the other requisite allegations. Domicile is as much an integral element in the litigation as the proof of cruelty or any of the other statutory grounds for divorce in Nevada. Labeling domicile as "jurisdictional" does not make it different from what it was before. Since the Nevada court had no power to render a divorce without proof of facts other than domicile, there is nothing to prevent this Court, under its expansive interpretation of the Due Process Clause, from labeling these other facts as "jurisdictional" and taking more state powers

the Nevada court to pass upon the question of domicile can hardly be doubted, since the concurring opinion in our first consideration of this case correctly said that the "Nevada decrees do satisfy the Due Process Clause and are binding in Nevada on the absent spouses . . . ." 317 U. S. 287, 306. The Court today, however, seems to place its holding that the Nevada decrees are void on the basis that the Due Process Clause makes domicile an indispensable prerequisite to a state court's "jurisdiction" to grant divorce. It further holds that this newly created federal restriction of state courts projects fact issues which the state courts cannot finally determine for themselves. *Davis* v. *Davis*, 305 U. S. 32, provides a possible exception to this holding. It decided that where both spouses appeared, a state court could finally determine the question of domicile. Whether the Court today overrules that case I cannot be sure. Certainly, if a state court cannot finally determine the question of domicile because it is a federal question, each divorce controversy involving domicile must be subject to review here whether both parties appear or not.

I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of state and federal power to see that they comport with our ideas of what are "civilized standards of law." *See Malinski* v. *People of the State of New York*, Nos. 367, decided March 26, 1945. I have not agreed that the Due Process Clause gives us any such unlimited power, but unless it does, I am unable to understand from what source our authority to strip Nevada of its power over marriage and divorce can be thought to derive. Certainly, there is no language in the Constitution which even remotely suggests that the Federal government can fix the limits

into the federal judicial orbit. Both these types of facts, however labeled, were part of the controversy which the Nevada legislature gave its courts power to resolve. The state could label them "jurisdictional" and having the exclusive power to grant divorces, could attach such consequences to them as it sees fit. But, while Congress might, under the Full Faith and Credit Clause, prescribe the "effect" in other states, of decrees based on the finding, I do not think the Federal courts can, by their mere label, attach jurisdictional consequences to the state's requirement of domicile. Hence, I think the quoted statement from the Magnolia Petroleum case should control this case.

of a state court's jurisdiction over divorces. In doing so, the Court today exalts "domicile", dependent upon a mental state, to a position of constitutional dignity. State jurisdiction in divorce cases now depends upon a state of mind as to future intent. Thus "a hair perhaps divides" the constitutional jurisdiction or lack of jurisdiction of state courts to grant divorces. Cf. *Pollack* v. *Williams*, 322 U. S. 4, 21. And this "hair-line" division involves a federal question, apparently open to repeated adjudications at the instance of as many different parties as can be found to raise it. Moreover, since it is a federal question, each new litigant has a statutory right to ask us to pass on it.

The two cases cited by the Court do not support this novel constitutional doctrine. *Bell* v. *Bell*, 181 U. S. 175, held a Pennsylvania decree invalid on the ground that there was no domicile shown. It specifically stated, however that *Pennsylvania law* required one year's domicile. Neither the decision in that case, nor any of the others on which it relied, rested on an interpretation of the Due Process Clause as requiring "domicile."[11] Nor did the decision in *Andrews* v. *Andrews*, 188 U. S. 14, support today's Due Process Clause extension, for there is was said that ". . . it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage . . . ."[12]

It is a drastic departure from former constitutional doctrine to hold that the Federal Constitution measures the power of state

[11] Streitwolf *v.* Streitwolf, 181 U. S. 179, decided the same day as Bell *v.* Bell, held a North Dakota divorce decree invalid. That holding did not rest on any "federal concept of domicile", but on the fact that North Dakota law required "a domicile in good faith . . . for ninety days as a prerequisite to jurisdiction of a case of divorce."

[12] Andrews *v.* Andrews did not assert that any particular federal constitutional provision made domicile a state jurisdictional requirement in divorce cases. It emphasized state and common law concepts of domicile and a state's power over its "inhabitants." This emphasis led the Court to permit Massachusetts to invalidate a South Dakota divorce decree, even though both husband and wife had appeared in the South Dakota Court. Cf. Davis *v.* Davis, *supra*. Massachusetts had a statute which prohibited its "inhabitants" from going into another state to get a divorce on account of conduct which occurred in Massachusetts, or for conduct which would not have authorized a divorce under Massachusetts law. This statute obviously rested on a hypothesis that each state possesses these sweeping powers over individuals: (1) power to make it a crime for its inhabitants to go to another state to engage in conduct which might be lawful there; (2) power to punish an inhabitant who went into another state and engaged in conduct in harmony with that state's laws. If North Carolina has attempted to impose such sweeping statutory prohibition upon its inhabitants, it has not been called to our attention. In its absence the *Andrews* decision gives no support to the opinion and judgment in this case.

courts to pass upon petitions for divorce. The jurisdiction of state courts over persons and things within their boundaries has been uniformly acknowledged through the years, without regard to the length of their sojourn or their intention to remain. And that jurisdiction has not been thought to be limited by the Federal Constitution. Legislative dissolution of marriage was common in the colonies and the states up to the middle of the Nineteenth Century. A legislative dissolution of marriage, granted without notice or hearing of any kind, was sustained by this Court long after the Fourteenth Amendment was adopted. *Maynard* v. *Hill*, 125 U. S. 190; *cf. Pennoyer* v. *Neff*, 95 U. S. 714, 734-735. The provision that made "due process of law" a prerequisite to deprivation of "life, liberty, or property" was not considered applicable to proceedings to sever the marital status. It was only when legislatures attempted to create or destroy financial obligations incident to marriage that courts began to conclude that their Acts encroached upon the right to a judicial trial in accordance with due process.[13] The Court's holding now appears to overrule *Maynard* v. *Hill*, sub silentio. This perhaps is in keeping with the idea that the due process clause is a blank sheet of paper provided for courts to make changes in the Constitution and the Bill of Rights in accordance with their ideas of civilization's demands. I should leave the power over divorces in the States. And in the absence of further federal legislation under the Full Faith and Credit Clause, I should leave the effect of divorce decrees to be determined as Congress commanded—according to the laws and usages of the state where the decrees are entered.[14]

Implicit in the majority of the opinions rendered by this and other courts, which, whether designedly or not, have set up obstacles to the procurement of divorces, is the assumption that divorces are an unmitigated evil, and that the law can and should force unwilling persons to live with each other. Others approach the problem as one which can best be met by moral, ethical and religious teachings. Which viewpoint is correct is not our concern. I am confident, however, that today's decision will no more

[13] Wright v. Wright's Lessee, 2 Md. 429, 453; Crane v. Meginnis, 1 G. and J. Rep. (Md.) 463; Dwyer v. Nolan, *supra*. See also Owens v. Clayton, 56 Md. 127, 129; 2 Shouler, Marriage, Divorce and Separation, Sixth Edition, Pars. 1474-1473; Validity of Legislative Divorce, 18 L. R. A. 95.

[14] For an interesting discussion of the consequences of shifting divorces from the legislatures to the courts, to be worked out in the pattern of adversary controversies, see Marshall and May, *supra*, Chap. VI, The Mirage of Judicial Controversy. For bibliography of pertinent discussions see same, 338-341.

aid in the solution of the problem than the *Dred Scott* decision aided in settling controversies over slavery. This decision, I think, takes the wrong road. Federal courts should have less, not more, to do with divorces. Only when one state refuses to give that faith and credit to a divorce decree which Congress and the Constitution command, should we enter this field.

The Court has not only permitted North Carolina to invalidate a Nevada decree contrary to the law and usage of that State. It has actually placed the burden of establishing the validity of that decree on a defendant charged with crime. The only contested question was the validity of the decree, since the petitioners openly lived together as man and wife. And the only issue involved concerning that validity was domicile. The burden of proving that single issue upon which petitioners' liberty depended was cast upon them. Cf. *State* v. *Herron*, 175 N. C. 754, 759. The jury was not charged that the state must prove the defendants guilty; they were required to prove their innocence. The result is that a state court divorce decree is no protection from being sent to prison in another state unless a defendant charged with acting as it authorized can prove the state court made no error in resolving facts as to domicile. State court judgments exalted by the Constitution and by Congress are thus degraded to a lowly status by today's decision. State courts, no less than Federal courts, were recognized by the founding fathers as instruments of justice. I would continue to recognize them as such. At the very minimum we should not permit holders of these decrees to be convicted of crime unless another state sustained the burden of invalidating them. In a case involving nothing but property, this Court has declined to permit a second marriage to be impugned through an alleged prior marriage "save upon proof so clear, strong and unequivocal as to produced a moral conviction of the existence of that impediment." *Su Jok Liong* v. *Su Quia*, 228 U. S. 335, 339. And we declined to permit a naturalization decree to be set aside because of an absence of "clear, unequivocal and convincing evidence." *Schneiderman* v. *United States*, 320 U. S. 118, 125, 159, 164, 166-170. It is no justification for requiring a less burdensome requirement here to say that in these former cases we were dealing with federal questions. That is exactly what is done here. For the basic question in this case revolves around the Full Faith and Credit constitutional provision and the 1790

Congressional Act.—The standard of proof sustained, is a federal, not a state standard. To require a defendant in a criminal case to carry the burden of proof in sustaining his decree to prove his innocence deprives him of all but the last shred of protection that the Full Faith and Credit Clause and the 1790 Act of Congress sought to give him. Cf. *Tot* v. *United States*, 319 U. S. 463, 473. It makes of human liberty a very cheap thing—too cheap to be consistent with the principles of a free government.

Moreover, the Court's unjustifiable devitalization of the Full Faith and Credit Clause and the Act passed pursuant to it creates a situation which makes the North Carolina statute an inescapable trap for any person who places the slightest reliance on another state's divorce decree—a situation which a proper interpretation of the federal question would avoid. The North Carolina statute excludes from its coverage those who "have been lawfully divorced." Who after today's decision can know or guess what "right" he can safely exercise under a divorce decree in the intervening period between the day of its entry and the day of its invalidation by a jury?[15] This Court has said that "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and *differ as to its application* violates the first essentials of Due Process of Law" (italics added).[16] The North Carolina statute, as applied to condemn these two petitioners to serve prison sentences, falls precisely within this description. It does so, because the sole essential contested issue in this case was the validity of the divorce decrees. Involved in this issue are questions of law mixed with questions of fact which perplex lawyers and judges little

[15] The answer is that by reason of today's decision, no person can exercise any right whatever under an uncontested divorce decree without subjecting himself to possible penitentiary punishment. "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment for that Act." Cummings v. The State of Missouri, 4 Wall. 277, 327. The "condition" here, that a divorced person cannot remarry without the possibility of being subjected to repeated prosecutions in all the states where he lives as a married person, would seem to rank as "an impossible condition." If therefore the Court's object is to make divorces dangerous, its object has been accomplished. I think divorce policy is the business of the people and their legislatures—not that of this Court.

[16] Connally v. General Construction Co., 269 U. S. 385, 391. See also Yu Cong Eng v. Trinidad, 271 U. S. 500, 518; United States v. Cohen Grocery Co., 255 U. S. 81, 89-93; Lanzetta v. New Jersey, 306 U. S. 451; Smith v. Cahoon, 283 U. S. 553; Screws, et al. v. United States, No. 42, decided May 7, 1945; cf. Nash v. United States, 229 U. S. 373, 377 with Cline v. Frink Dairy, 274 U. S. 445, 457, 463-464.

less than they baffle "men of common intelligence." Today's decision adds new intricacies to the whole problem for lawyers to argue about. It provides a new constitutional concept of "jurisdiction", which itself rests on a newly announced Federal "concept of domicile." No final determination as to its own "jurisdiction" can hereafter be made by a state court in an uncontested divorce case. And so far as I can tell, no other court can ever finally determine this question. It might do so as between any two litigants, but I suppose the question of domicile would still be left open for others to challenge. A man might be tried for bigamy in two states. He might be convicted in one or both, I suppose. The affirmance of these convictions shows that a divorced person's liberty, so far as this North Carolina statute is concerned, hinges on his ability to "guess" at what may ultimately be the legal and factual conclusion resulting from a consideration of two of the most uncertain word symbols in all the judicial lexicon, "jurisdiction" and "domicile." While the doctrine that "Ignorance of the law excuses no man" has sometimes been applied with harsh consequences, American courts have not been in the habit of making ignorance of law the crucial and controlling element in a penitentiary offense. Men have from time to time been sent to prison for violating court commands which were later held invalid.[17] It is quite a different thing, however, to send people to prison for lacking the clairvoyant gift of prophesying when one judge or jury will upset the findings of fact made by another.

In earlier times, some Rulers placed their criminal laws where the common man could not see them, in order that he might be entrapped into their violation. Others imposed standards of conduct impossible of achievement to the end that those obnoxious to the ruling powers might be convicted under the forms of law. No one of them ever provided a more certain entrapment, than a statute which provides a penitentiary punishment for nothing more than a layman's failure to prophesy what a judge or jury will do. This Court's decision of a federal question today does just that.

Mr. Justice DOUGLAS joins in this dissent.

[17] See e. g., People v. Worley, 72 Col. 421; Holbrook v. Prichard Motor Co., 27 Ga. App. 480; St. George's Soc. v. Sawyer, 204 Iowa 103; State v. Morris, 100 Oregon 1.